> While some existing offences are broad enough to capture technology-facilitated stalking and abuse, we are not seeing them used. There are also gaps and deficiencies where the law has not yet caught up – for example, in relation to non-consensual sharing of intimate images.[89]

3.42 A number of inquiry participants, including the NSW Privacy Commissioner, Dr Coombs, Dr Henry and representatives of Women's Legal Services NSW, suggested that women subjected to this form of abuse would benefit from enhanced access to remedies that responded to the harm, such as take-down and deliver up orders. In that regard, Women's Legal Services submitted that legislation governing apprehended violence orders, as well as any statutory tort for invasion of privacy (considered in the next chapter) should include provisions that allow for magistrates to grant this type of injunctive relief in a clear and simple way.[90]

3.43 In addition, Ms Alexandra Davis, Solicitor, Women's Legal Services NSW argued that there were various improvements that could be made to better support women experiencing this type of abuse. Police in New South Wales currently receive training in domestic and family violence and are supported in responding to these incidents through various specialist supports within the organisation, including the Domestic Violence Liaison Officer network, Domestic and Family Violence Team and Region and Corporate Sponsors for Domestic and Family Violence.[91] However, Ms Davis advocated for police to be provided with additional training to assist them to better understand and investigate these types of matters, for better access to remedies including take-down orders, and for specialist services that could provide support to victims:

> The second challenge is police attitudes and evidence-gathering capabilities. There is an urgent need for training to overcome the common attitude that technology-facilitated harassment is somehow less serious and less harmful than behaviours in person and that proving that the offender is responsible is somehow more burdensome when technology is involved. The third challenge is access to remedies and support. There is a need for a quick, accessible way of obtaining a take-down order. There is also a need for specialist services that are trained to assist women to access comprehensive planning for the safe use of technology and to remove spyware from devices.[92]

3.44 Women's Legal Services made a number of recommendations regarding a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* and apprehended violence orders. The organisation suggested:

> 8.4 Updated consultation on the statutory review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW), including an exposure draft bill that contemplates the realities of technology-facilitated stalking and abuse.

89 Evidence, Ms Davis, 30 October 2015, p 44.

90 Submission 32, Women's' Legal Services NSW, p 2, pp 33-34.

91 Assistant Commissioner Mark Murdoch, NSW Police Force, *Introduction and Message from the Corporate Spokesperson,* http://www.police.nsw.gov.au/community_issues/domestic__and__family_violence/introduction

92 Evidence, Ms Davis, 30 October 2015, p 44.

> 8.5 Including an apprehended violence order (AVO) prohibiting the defendant from attempting to locate, asking someone else to locate, follow or keep the protected person under surveillance.
>
> 8.6 Including an AVO prohibiting the actual or threatened publishing or sharing of images or videos of the protected person of an intimate nature.
>
> 8.7 Including a provision allowing AVOs to be used for an injunctive order such as a take down order or deliver up order.[93]

Surveillance legislation

3.45 There is also surveillance legislation that may also have application to some privacy invasion scenarios. For example, under the *Surveillance Devices Act 2007* (NSW) unauthorised audio recording without consent is a criminal offence. The Act does not, however, prevent video recording without consent.[94]

3.46 The *Workplace Surveillance Act 2005* (NSW) and *Telecommunications (Interception) Act 1979* (Cth) also regulate, to some extent, the use of surveillance devices and telecommunications interceptions at a state and federal level.[95]

3.47 Mr Kirk McKenzie, Chair of the Human Rights Committee at the Law Society of NSW Human Rights Committee expressed concern that the state's existing legislative framework does not regulate audio recording:

> The surveillance devices Act of this Parliament, although it prohibits audio recording without consent, does not prevent video recording without consent. Although we did not address that issue in any great detail in our submission, it struck me, upon reading that submission, that it really is something of a problem.[96]

3.48 The Law Society of NSW subsequently provided more information on the issue, referring to the work of the Victorian Law Reform Commission in a 2010 report on surveillance in public places. The commission recommended the enactment of a new offence prohibiting the use of surveillance devices to intimidate, demean or harass a person of ordinary sensibilities; or to prevent or hinder a person from performing an act they are lawfully entitled to do. It also recommended a civil and alternative criminal penalty for breaches of the offence.[97]

3.49 The policy rationale behind the Victorian Law Reform Commission's recommendation was that:

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93 Submission 32, Womens' Legal Services, NSW, p 2.

94 Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW, 30 October 2015, p 40.

95 *Surveillance Devices Act 2007* (NSW); *Workplace Surveillance Act 2005* (NSW); *Telecommunications (Interception) Act 1979* (Cth).

96 Evidence, Mr McKenzie, 30 October 2015, p 30.

97 Victorian Law Reform Commission, *Final Report into surveillance in public places*, 1 June 2010 (hereafter referred to as 'VLRC 2010 Report'), p 125 (Recommendations 20 and 21) cited in Answers to questions on notice, Mr JF Eades, President, NSW Law Society, 18 November 2015, p 2.

> The primary purpose of such a new offence would be to send a clear message to the community that various forms of behaviour with a surveillance device are unacceptable.[98]

3.50 The Law Society's Human Rights Committee supported the view of the Victorian Law Reform Commission, and considered that 'at a minimum, the use of fixed video surveillance devices should be regulated by statute'.[99]

Committee comment

3.51 The committee recognises that a number of criminal offences currently on the New South Wales statute books may have application to some forms of serious invasions of privacy. However, we note the evidence that the available offences fail to cover some key types of privacy invasions, particularly the 'revenge pornography' type scenarios.

3.52 The committee acknowledges the support from a number of inquiry participants for a new criminal offence of taking and disseminating intimate images without consent, or threatening to do so. However, the committee's remit for this inquiry was to consider the adequacy of existing remedies for serious invasions of privacy, rather than to consider the introduction of new criminal offences.

3.53 Further, we note that there is a Criminal Code Amendment (Private Sexual Material) Bill 2015 currently before the Australian Parliament (discussed further at 3.113) which, if passed, will make revenge pornography a federal criminal offence.

3.54 The committee notes that the Senate Legal and Constitutional Affairs Reference Committee recently made recommendations for the introduction of criminal offences at a federal level as well as in the states and territories, specifically to address non-consensual sharing of intimate images. Recommendations 2 and 3 of the Senate committee's report state:

> Recommendation 2
>
> 5.18 Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state and territory legislation, offences for:
>
> - knowingly or recklessly recording an intimate image without consent;
> - knowingly or recklessly sharing intimate images without consent; and
> - threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.[100]
>
> Recommendation 3
>
> The committee recommends that the states and territories enact legislation with offences the same or substantially similar to those outlined in Recommendation 2, taking into account relevant offences enacted by the Commonwealth government.[101]

98 VLRC 2010 Report, p 122 cited in Answers to questions on notice, Mr JF Eades, 18 November 2015, p 2.

99 Answers to questions on notice, Mr JF Eades, 18 November 2015, p 1.

100 Recommendations 2, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.

3.55 We note the above report. It would be appropriate for the NSW Government to consider the Senate Committee's recommendations.

3.56 A civil response to the taking and disseminating intimate images without consent will be captured in chapter 4 under the broader question of whether there is a need for a statutory cause of action to provide adequate remedies for such invasions.

3.57 In regard to police responses to technology-facilitated stalking, abuse and harassment, the committee agrees with the suggestion of Women's Legal Services that better training and resourcing is needed in this area. We understand that all police receive training in domestic and family violence however, the committee considers that there is room for further development of officers in responding specifically to allegations of this nature.

Recommendation 1

That the NSW Police Force:

a) ensure that its officers receive training in the harms associated with technology-facilitated stalking, abuse and harassment; and

b) that the training incorporate education about how existing offences and other orders, such as apprehended violence orders, could be used in respect of allegations of that nature.

3.58 The committee believes there is merit in the Women's Legal Services NSW submission that the Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*. This review should consider the benefits of including in the potential orders available to a local court in proceedings under the Act including take down orders and prohibitions on threatening or publishing or sharing of images or videos of an intimate nature.

Recommendation 2

That the NSW Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* to consider additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by apprehended domestic violence orders.

3.59 In regard to surveillance legislation, the committee considers that there is a gap in the framework regulating video recording, and notes the comments of the NSW Law Society and the work of the Victorian Law Reform Commission.

3.60 However, given the limited evidence received the committee does not have sufficient information to make a recommendation regarding legislative reform in this area.

[101] Recommendations 3, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.

Common law actions and remedies

3.61 There is currently no common law tort in Australia specifically designed to protect privacy. However, there are a number of common law actions which may have application to some serious invasions of privacy. For example, the committee heard that the common law actions of trespass, nuisance, defamation, passing off, malicious falsehood and contempt were some options which *may* be available to victims of such invasions.[102]

3.62 Members of the arts community and representatives of the media argued that torts such as nuisance and trespass provide adequate means for people to seek redress for serious invasions of privacy.[103]

3.63 However, the ALRC considered that there were 'several gaps and inconsistencies in existing [common law] legal protection that may amount to an invasion of privacy'.[104] This view was echoed by other inquiry participants.[105] The ALRC stated:

> The tort actions of trespass to the person, trespass to land and nuisance do not provide protection from unauthorised and serious intrusions into a person's private activities in many situations. Trespass to the person requires bodily contact or a threat of such contact. Trespass to land and nuisance protect only the occupier of the land and the former requires an intrusion onto the land.
>
> In many tortious actions – aside from trespass, malicious prosecution and defamation – there is no remedy for the intentional infliction of emotional distress that does not amount to a psychiatric illness.[106]

3.64 The Australian Lawyers Alliance noted that the actions of trespass to land and nuisance had been used in respect of factual scenarios involving freedom from intrusion, but that there were limitations to how far they would go in protecting privacy. In relation to trespass, the Alliance commented:

> The trespass action was used successfully against a television crew in *Lincoln Hunt v Willesee*. But it would not be available to those who filmed or were otherwise subjected to surveillance from outside the property boundary.[107]

3.65 Although there is currently no common law privacy tort in Australia, the High Court left open the development of such a tort in the case of *ABC v Lenah Game Meats*. That case is discussed in more detail in the following section in the context of the equitable action of breach of

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102 Submission 4, Australian Law Reform Commission, p 4; Submission 31, NSW Privacy Commissioner p 11; Submission 11, Arts Law Center of Australia, p 6; Submission 20, Free TV Australia, p 10; Submission 30, Dr Normann Witzleb, p 2.

103 Evidence, Ms Robyn Ayres, Executive Director, Arts Law Centre of Australia, 16 November 2015, pp 3-4; Evidence, Ms Sarah Waladan, Manager, Media Policy and Regulatory Affairs, Free TV Australia, 16 November 2015, pp 11-12.

104 Submission 4, Australian Law Reform Commission, p 2.

105 See, for example, Submission 10, Australian Lawyers Alliance, pp 4-5; Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, p 11.

106 Submission 4, Australian Law Reform Commission, p 2.

107 Submission 10, Australian Lawyers Alliance, p 4.

confidence, which has been described as 'the main avenue of protecting privacy [in Australia]'.[108]

Equitable action of breach of confidence

3.66 The committee was specifically tasked, through its terms of reference, with examining the adequacy of the equitable action of breach of confidence in remedying serious invasions of privacy.

3.67 Breach of confidence actions are intended to protect individuals from the unauthorised disclosure of confidential information.[109] The equitable action:

> … provides for a civil law remedy where information provided in confidence, in circumstances where there is a pre-existing obligation of which the defendant is aware [or ought to have been aware], is communicated to a third party.[110]

3.68 Breach of confidence has traditionally been applied to contractual or commercial relationships. In those relationships, where a contract implies that particular information is confidential in nature and that information is subsequently disclosed, the affected party can not only bring an action for breach of contract, but can pursue an equitable action for breach of confidence.

3.69 The obligation of confidence in breach of confidence requires three elements. First, that the information must have the necessary quality of confidence about it. Second, that the information must have been imparted in circumstances importing an obligation of confidence. And third, that there must be an unauthorised use of that information to the detriment of the party communicating it.[111]

3.70 In some common law jurisdictions, particularly in the United Kingdom, courts have interpreted the second limb of the obligation broadly, so that the requirement for a pre-existing relationship (which generally exists in contractual and commercial relationships, but does not always in intimate or personal relationships) is no longer necessary to found an action for breach of confidence.[112] The NSW Young Lawyers Communications, Entertainment and Technology Committee (CET Committee) referred to the 2004 case of *Campbell v MGN Ltd*, involving supermodel Naomi Campbell and UK print publication *The Mirror*. In that case (which is discussed in more detail at paragraphs 3.90 - 3.92), Lord Nicholls opined that:

108 Submission 30, Dr Normann Witzleb, Attachment 8, p 80.

109 Submission 5, Mr Seppy Pour, p 9.

110 Submission 9, Public Interest Advocacy Centre, p 6.

111 Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 3, quoting *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

112 Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, pp 3-4.

> [A] 'duty of confidence' can be owed whenever a person 'receives information he knows or ought to know is fairly and reasonably to be regarded as confidential'.[113]

3.71 It has been suggested that there is 'uncertainty' around how strictly the second element of the breach of confidence action applies in Australia, because:

> … the circumstances in which equity may impose such an obligation are not sufficiently clear. Some of the most serious invasions of privacy, including the taking of intimate photographs, could foreseeably involve no pre-existing relationship.[114]

3.72 Remedies available in breach of confidence actions include injunctions (to prevent publication of information for example), an account of profits and compensation.[115] A number of inquiry participants, including the ALRC, Dr Witzleb and the CET Committee noted that, with the exception of a couple of recent cases (discussed below), the approach in Australia has been that emotional distress was not compensable under this action. In many cases involving a serious invasion of privacy the plaintiff is unlikely to suffer economic loss (which is compensable) and, while suffering shame, emotional distress or mental harm, would struggle to meet the required threshold of psychiatric injury to enable the court to award compensation.[116]

3.73 The Public Interest Advocacy Centre observed that the uncertainty of remedies in breach of confidence actions is a major issue in utilising the action for serious invasions of privacy:

> … the primary issue in relying on breach of confidence to protect personal privacy lies in the uncertainty of remedies available. Generally, the equitable action has been considered to be more effective in preventing breach of privacy rather than providing compensation after the fact.[117]

Development of breach of confidence in Australia

3.74 The action of breach of confidence was considered by the High Court in the 2001 case of *Lenah*. The facts of the case were that unknown people unlawfully entered a meat processing plant operated by Lenah Game Meats and installed hidden cameras without consent or knowledge of the operator. The footage captured depicted the slaughtering process of possums at the plant. The footage was supplied to an animal rights organisation, which provided it to media organisation ABC. Lenah, having become aware of the ABC's plans to broadcast the footage, sought an interlocutory injunction to prevent the broadcast.

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113 Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 3, quoting *Campbell v MGN Ltd* [2004] 2 AC 457 at 464-5.

114 Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 4.

115 Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 4; Submission 30, Dr Normann Witzleb, p 3.

116 Submission 4, Australian Law Reform Commission, p 3; Submission 30, Attachment 1, Dr Normann Witzleb, pp 18-20; Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 5. See also, Submission 9, Public Interest Legal Centre, p 16.

117 Submission 9, Public Interest Advocacy Centre, p 6.

3.75 Lenah argued three grounds: first that the slaughtering operations were confidential and broadcasting of the footage would amount to a breach of confidence. Second, that as the footage was obtained unlawfully (because unknown persons committed trespass to install the cameras) and that act was unconscionable, the court should prevent broadcast. Third, that broadcasting of the footage would amount to an invasion of Lenah's privacy.

3.76 The court considered that, in those circumstances, the equitable action of breach of confidence did not apply because the act filmed (i.e. the slaughtering process) was not innately private. Gleeson CJ held that the filming of such activities on private property does not deem the act filmed as private:

> I regard the law of breach of confidence as providing a remedy, in a case such as the present, *if* the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential. *But, if that condition is not fulfilled, then the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it* [Empasis added]. [118]

3.77 The court went on to deny the grounds of unconscionability and invasion of privacy.

3.78 There have been only two cases in Australia that have seen the equitable action of breach of confidence used successfully in response to an invasion of privacy that the committee is aware of. The most recent is the 2015 Western Australian case of *Wilson v Ferguson*, which drew on the decision of the 2008 Victorian Court of Appeal decision, *Giller v Procopets*, and is discussed below.

Case study *Wilson v Ferguson* [2015] WASC 15

The facts

The plaintiff (Ms Wilson) and the defendant (Mr Ferguson) worked as fly-in fly-out workers at the Cloudbreak Mine in Western Australia, and had commenced a relationship together.

During the course of their relationship they had exchanged photographs and videos with each other of themselves which were of a sexual and intimate nature using their mobile phones. On one occasion the defendant accessed the plaintiff's phone without her consent and emailed himself videos of the plaintiff engaging in sexual activity. The plaintiff gave evidence at trial of an understanding with the defendant (reiterated by text messages from her to the defendant to this effect) that the photographs and videos were to remain private between them and other people would not see them.

The relationship broke down and the plaintiff informed the defendant she did not want to see him again. The defendant subsequently posted 16 of the explicit photographs and two videos showing the plaintiff on his Facebook page, making them available to his approximately 300 Facebook friends, many of whom worked at Cloudbreak with the plaintiff. The defendant sent two text messages to the plaintiff referring to the Facebook posts, one of which included the sentence: 'Can't wait to watch u fold as a human being'.

[118] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 per Gleeson CJ at 55. See also Submission 9, Public Interest Advocacy Centre, p 6.

The plaintiff also received telephone calls and text messages from friends alerting her to the defendant's Facebook posts. The plaintiff sent a series of text messages to the defendant begging him to remove the photographs and videos. Later that day the defendant removed them from his Facebook page.

Evidence from a co-worker was given at trial of the photographs and videos having been viewed and widely discussed by a significant number of the plaintiff's co-workers at Cloudbreak.

Breach of confidence

The Western Australian Supreme Court found the defendant's conduct in posting the photographs and videos of the plaintiff to his Facebook page was a breach of his equitable obligation to the plaintiff due to the confidential nature of the images, the circumstances in which they were obtained (some without consent) and their unauthorised disclosure to others by the defendant.

Remedies

An injunction was granted prohibiting the defendant from publishing photographs or videos of the same nature. The plaintiff also sought equitable relief for the impact upon her of the publication of the images. The plaintiff gave evidence that she suffered humiliation, distress, anxiety, difficulty sleeping, and that she had taken time off work without pay and undergone counselling.

The court considered whether equitable compensation could be awarded to a plaintiff for non-economic loss comprising embarrassment and distress caused by disclosure of private images in breach of an equitable obligation of confidence. It was noted that damages for emotional distress falling short of a recognised psychiatric or psychological injury are available only in very limited circumstances and that equitable compensation in Australian cases had, until recently, only been awarded to compensate for economic loss.

The court had regard to an earlier decision of the Victorian Court of Appeal in *Giller v Procopets* [2008] VSCA 236 where publication of a videotape depicting sexual activity amounted to a breach of confidence. Mitchell J referred to technological advances since that have:

> … dramatically increased the ease and speed with which communications and images may be disseminated to the world… The process of capturing and disseminating an image to a broad audience can now take place over a matter of seconds by a few finger swipes of a mobile phone … In many cases, such as the present, there will be no opportunity for any injunctive relief between the time when a defendant forms the intention to distribute the images of a plaintiff and the time when he or she achieves that purpose.[119]

The court agreed with the decision in *Giller* that the equitable doctrine of breach of confidence should be developed by extending the relief available for the unlawful disclosure of confidential information to include monetary compensation for embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature.

119 *Wilson v Ferguson* [2015] WASC 15 at [80].

Damages

The court awarded the plaintiff $35,000 for her significant embarrassment, anxiety and distress, in addition to $13,404 for economic loss on the basis that the plaintiff felt unable to return to work after the incident and took unpaid leave. Mitchell J noted that the impact of the disclosure on the plaintiff was aggravated by the fact the release of the images was an act of retribution by the defendant, and he intended to cause harm to the plaintiff.

Adequacy of breach of confidence action

3.79 Some stakeholders argued that the fact that the plaintiffs in *Giller* and *Ferguson* were able to achieve redress for non-economic loss relating to a technology-facilitated invasion of privacy through the equitable action for breach of confidence demonstrated that the common law can adequately remedy such invasions. For example, the Arts Law Centre of Australia stated:

> [*Wilson v Ferguson*] … illustrates the adequacy of the equitable action of breach of confidence and its adaptability to new technological developments facilitating serious invasions of privacy.[120]

3.80 However, notwithstanding these cases, a number of other stakeholders considered that the action has not developed enough to be a reliable source of remedy, and that waiting for the common law to develop further in relation to a privacy tort was undesirable.[121]

3.81 Further (and again notwithstanding *Giller* and *Wilson*), Mr Stephen Blanks, President of the NSW Council for Civil Liberties submitted that the equitable action of breach of confidence is not well crafted to respond to broader public interest matters, given that it traditionally applies in commercial contexts where obligations of confidence arise.[122]

3.82 Mr Edward Santow, Chief Executive Officer of the Public Interest Advocacy Centre, reflecting on the inadequacy of privacy protections in New South Wales, also expressed doubt about the suitability of breach of confidence actions for remedying invasions of this nature:

> … there is not a well-developed privacy tort that exists. Instead, what tends to happen at the moment is that individuals try to fit square pegs in round holes and will use other causes of action such as breach of confidence in a situation where fundamentally the concern is a breach of privacy.[123]

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120 Submission 11, Arts Law Centre of Australia, p 3. See also Submission 20, Free TV Australia, p 1; Submission 22, Joint Media Organisations, p 4.

121 See, for example, Evidence, Ms Hanna Ryan, Vice President, NSW Council for Civil Liberties, 30 October 2015, p 15; Evidence, Professor Barbara McDonald, Australian Law Reform Commission, 30 October 2015, p 20.

122 Evidence, Mr Stephen Blanks, President, NSW Council for Civil Liberties, 30 October 2015, p 16. For detail on cases, see Answers to questions on notice, NSW Council for Civil Liberties, 26 November 2015, pp 4-5.

123 Evidence, Mr Edward Santow, Chief Executive Officer, Public Interest Advocacy Centre, 16 November 2015, p 46.

3.83 Dr Witzleb made a similar point, arguing that existing civil remedies, including breach of confidence, were designed to protect other interests, and that the protection they offered in respect of privacy was 'incidental' and often a poor fit:

> At present, the right to privacy is only protected incidentally, when the invasion of privacy can be shoehorned into an existing cause of action. Civil wrongs that can provide incidental protection to privacy interests, although they are primarily designed to protect other legal interests, include trespass to the person, trespass to land, nuisance, defamation and the equitable cause of action for breach of confidence.[124]

Committee comment

3.84 The committee acknowledges that there are a range of common law actions currently available in New South Wales, such as nuisance, trespass and defamation, which may enable a response to some serious invasions of privacy. However, we also acknowledge the evidence that there are gaps and inconsistencies in the existing common law protections that fail to address other invasions of privacy, and note that there is currently no common law tort in Australia to protect privacy.

3.85 In regard to the adequacy of the equitable action of breach of confidence, which the committee was specifically tasked with examining, we note that the action was successfully used in the cases of *Giller* and *Wilson* in to provide compensation for distress arising as a result of revenge pornography. The committee is of the view that the precedents established by those cases in awarding compensation for non-economic loss in technology-facilitated invasions of privacy are a promising step in the right direction toward the provision of an appropriate remedy in this area. At the same time however, given the evidence received regarding the 'poor fit' of this action to breaches of privacy due to it traditionally being applied to contractual or commercial relationships, and the fact that there has been little to no development of the common law in New South Wales, the committee believes that more needs to be done now to better protect and remedy serious breaches of privacy in New South Wales. As will be seen in chapter 4, we recommend that this be achieved through the introduction of a statutory cause action.

Approaches in other jurisdictions

3.86 This section considers the approaches in other Australian jurisdictions, as well as comparable jurisdictions internationally, that have moved toward providing for a cause of action for serious invasions of privacy.

United Kingdom

3.87 The United Kingdom has been a leader in terms of recognising the right to protection of personal privacy and the subsequent need to provide an adequate legal response to invasions of it. This is attributable to two key factors.

3.88 First, in 1998 the United Kingdom enacted the *Human Rights Act 1998* (HRA), which effectively incorporated the *European Convention on Human Rights* (ECHR) into domestic law.

[124] Submission 30, Dr Normann Witzleb, p 2.

The enactment of the HRA has been described as a 'watershed moment for the development of privacy protection in the UK'.[125]

3.89 The second factor builds upon the first, in that the HRA required all public authorities to 'act compatibly with every individual's right to respect for his or her private life'.[126] But perhaps more critically:

> [The HRA and the ECHR mean that] the courts are now mandated to develop the common law in a way that gives equal effect to both Art. 8 of the European Convention on Human Rights (the protection of private life) and its Art. 10 (the protection of freedom of speech).[127]

3.90 The UK courts have 'keenly embraced' the application of the HRA and the ECHR through the equitable action of breach of confidence, which was developed significantly as a result of the case of *Campbell v MGN Ltd* [2004] 2 AC 457. The facts in that case were that supermodel Naomi Campbell was photographed leaving a Narcotics Anonymous meeting in London. The Mirror subsequently published the images, under the headline 'Naomi: I'm a drug addict', and the article contained detailed information relating to Ms Campbell's treatment for addiction. Ms Campbell claimed damages, among other things, breach of confidentiality.

3.91 The House of Lords in *Campbell* recognised a distinct cause of action for 'misuse of personal information'. The decision:

> … removed the protection of privacy from the shackles of the equitable doctrine of breach of confidence and effectively created a common law right to privacy.[128]

3.92 The result has been described as developing the UK 'from a laggard in privacy protection to a jurisdiction that not only matches European standards but can now also claim to have the most vigorous public and legal discourse on privacy rights'.[129]

3.93 In summary, the United Kingdom has not enacted a statutory cause of action for serious invasions of privacy because the common law equitable action relating to breach of confidence has developed in such a way as to provide for an adequate remedy to claimants:

> In contrast to the traditional action for breach of confidence, a claimant [in the UK] now no longer needs to prove that the defendant received the information in circumstances importing an obligation of confidence. It is the quality of the

125 Submission 30, Dr Normann Witzleb, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives, Cambridge University Press 2014* (in production), p 4.

126 Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives,* p 4.

127 Submission 30, Dr Normann Witzleb, p 6.

128 Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 1.

129 Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 1.

information as private, rather than the character of the relationship between the parties, that is now determinative.[130]

New Zealand

3.94 The law in New Zealand has also developed on the back of a human rights framework, although the *Bill of Rights Act 1990* does not provide for an express 'right to privacy'. It does, however, provide an express right to freedom of expression.[131]

3.95 Developments through New Zealand common law have seen the creation of a privacy tort, with protection extending to breaches of privacy that involve publicising private and personal information, and for intrusion upon seclusion.[132]

3.96 In the 2004 case of *Hosking v Runting*, the Court of Appeal defined the action relating to publicising private information through the cumulative application of two criteria: first that the plaintiff had a reasonable expectation of privacy, and second that the publication would be 'highly offensive' to a reasonable person.

3.97 However, since *Hosking*, which succeeded with a 'bare majority' of the court, members of the NZ Supreme Court have 'cast doubt on this development'.[133]

3.98 The law was further developed in the 2012 case of *C v Holland*, where the plaintiff was subject to surreptitious filming by a housemate who installed a camera in the bathroom and recorded footage while she undressed and showered. There was no subsequent disclosure of the footage. In that case, the High Court defined the elements of the tort of intrusion upon seclusion as that the defendant had intruded into the plaintiff's solitude and seclusion; infringed a reasonable expectation of privacy, and that his act was highly offensive to a reasonable person.[134]

3.99 In its submission to this inquiry, the ALRC noted that there had been inquiries into privacy protection in New Zealand (and the United Kingdom) which recommended *against* the introduction of a statutory cause of action to remedy invasions of this nature.[135] However, it advised that those recommendations 'must be seen in light of the significant and recent developments in the common law in those two countries'.[136]

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130 Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 6.

131 Cl 14, *New Zealand Bill of Rights Act 1990*.

132 *Hosking v Runting* [2004] NZCA 34*; C v Holland* [2012] 3 NZLR 277 respectively. Intrusion upon seclusion generally refers to invasions or intrusions into a person's private physical space.

133 *Television New Zealand Ltd v Rogers* [2007] NZSC 91; [2008] 2 NZLR 277 at [177] per Anderson J; [25] per Elias CJ cited in Submission 30, Dr Normann Witzlebb, Attachment 7, p 105.

134 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 13 quoting Whata J at [6]-[7] in *C v Holland* [2012] 3 NZLR 277.

135 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012); New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3*, Report No 113 (2010) cited in ALRC 2014 Report, p 22.

136 ALRC 2014 Report, p 22.

Canada

3.100 Privacy is protected in Canada through a range of mechanisms. Of particular relevance to this inquiry is that four of its provinces have legislated for statutory torts for invasion of privacy.[137]

3.101 The Communications, Entertainment & Technology Law Committee of NSW Young Lawyers (CET Committee) noted that these torts are 'actionable without proof of damage, for a person to wilfully and without claim of right, to violate the privacy of another person'.[138] The CET Committee noted that remedies available for these statutory torts include damages, injunctions, account for profits, or delivery of documents. Defences include consent, lawful authority, and in the case of publication, public interest, fair comment or privilege under defamation law.[139]

3.102 The former President of the ALRC, Professor Barbara McDonald, expressed the view that the statutory torts enacted in the Canadian provinces had been 'quite effective'. She noted that despite concern from the media and others, the introduction of statutory privacy torts in Canada had not opened the floodgates to litigation.[140]

3.103 In addition, Canada has privacy protections through various pieces of legislation,[141] the *Canadian Charter of Rights and Freedoms* (which applies only to government),[142] and the common law (*Jones v Tsige*[143] and *Jane Doe 464533 v N.D*[144]). In what is believed to be the first case of its kind in Canada, the 2016 *Jane Doe* decision held a man financially liable for posting a private sex tape of a former girlfriend online. The 'revenge pornography' claim resulted in a total award of $141,708.03, including the maximum damages available in the jurisdiction of $100,000, incorporating general damages of $50,000, and aggravated and punitive damages of $25,000 each respectively.[145] Like the NZ *Bill of Rights*, the Canadian Charter does not contain an express right to privacy, however s 7 ('right to life, liberty, and security of the person') and s

137 These are British Columbia, Manitoba, Newfoundland and Labrador, Quebec and Saskatchewan – see Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 11.

138 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 12, quoting *Privacy Act* , RSBC 1996, c 373, s 1(1); *Privacy Act* , RSS 1978, c P-24, s 2; *Privacy Act*, RSNL 1990, c P-22, s 3(1). Manitoba's statute uses the language of "substantially, unreasonably and without claim of right": *Privacy Act*, CCSM, c P125, s 2(1).

139 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 12.

140 Evidence, Professor Barbara McDonald, Professor, Faculty of Law, University of Sydney, 30 October 2015, p 24.

141 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 13, quoting *Privacy Act*, RSC 1985, c P-21; *Access to Information Act*, RSC 1985, c A-1; these statutes address collection, use and disclosure of personal information by government agencies and rights of access to personal information held by government organisations.

142 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 13, quoting *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, Sch B to the *Canada Act 1982* (UK) 1982, c 11.

143 (2012) 108 OR (3rd) 241.

144 *Doe 464533 v N.D*, 2016 ONSC 541.

145 *Doe 464533 v N.D*, 2016 ONSC 541.

8 ('the right to be secure against unreasonable search or seizure') have been applied to protect 'reasonable expectations of privacy'.[146]

3.104 The CET Committee noted that in addition to these protections, the Commissioner of Canada investigates complaints of potential breaches of privacy and makes recommendations in relation to internet privacy.[147]

Revenge pornography offences

3.105 As noted earlier in this chapter, New South Wales does not have specific offences targeting revenge pornography type conduct. However, a number of jurisdictions outside New South Wales have enacted criminal offences specifically designed to target this type of behaviour.

3.106 South Australia was the first Australian jurisdiction to enact a specific offence to respond to such conduct. In 2013, the *Summary Offences (Filming Offences) Amendment Act 2013* (SA) created s 26C, 'distribution of an invasive image', into the *Summary Offences Act 1953* (SA).

3.107 Section 26C provides that a person commits an offence if they distribute an invasive image of another person, knowing or having reason to believe that the other person does not consent to the distribution of the image. A maximum penalty of $10,000 or two years imprisonment applies.[148]

3.108 'Invasive image' is defined in the Act as a moving or still image of a person (a) engaged in a private act; or (b) in a state of undress such that the person's bare genital or anal region is visible, but does not include an image of a person under, or apparently under, the age of 16 years or an image of a person who is in a public place.[149]

3.109 The South Australian offence is restricted only to circumstances where distribution has occurred and would not capture, for example, threats to distribute such material.

3.110 In 2014, Victoria created an offence of maliciously distributing, or threatening to distribute, intimate images without consent.[150] 'Intimate image' is defined as a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or context that is sexual; or (c) the genital or anal region of a person or, in the case of a female, the breasts.[151]

3.111 Since 2007, Victoria has also had offences that criminalise the intentional observation, using a device, of a person's genital or anal region, or to intentionally visually capture the same region,

146 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 12 quoting *R v O'Connor* [1995] 4 SCR 411, (1995) DLR (4th) 235, *Hunter v Southam Inc* [1984] 2 SCR 145.

147 Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 11.

148 *Summary Offences Act 1953* (SA), s 26C(1).

149 *Summary Offences Act 1953* (SA), s 26A.

150 *Summary Offences Act 1966* (Vic), ss 41DA and 41DB respectively.

151 *Summary Offences Act 1966* (Vic), s 40.

in circumstances where it would be reasonable for that person to expect that they could not be observed in this way. An additional offence is available for the distribution of such images.[152]

3.112 There are some offences available under Commonwealth legislation, including section 474.17 of the *Criminal Code Act 1995*, which criminalises menacing, harassing or offensive behaviour via carriage services. The offence carries a maximum three year sentence.

3.113 As mentioned earlier in this chapter, at the federal level there is a Criminal Code Amendment (Private Sexual Material) Bill 2015 currently before the Australian Parliament that is designed to respond to the issue of revenge pornography. Three rationales are outlined in the second reading speech for the introduction of the federal offences, which relate directly to the South Australian and Victorian offences. First, it is asserted that the existing state laws are 'too broad in scope to directly target revenge porn'. Second, it is said that 'they are not being used by law enforcement agencies or the courts to stamp out the prevalence of revenge porn'. Finally it is suggested that they 'fail to send a clear message to the broader community that the sharing of private sexual images without the subject's consent is not just wrong but is prohibited by law'.[153]

3.114 The federal bill proposes the introduction of three new telecommunications offences:

- sharing private sexual material of a person without their consent where it will cause them distress or harm
- making a threat to another person to share private sexual material that they are depicted in, or another person that they care about it depicted in
- engaging in the above two offences for the purpose of obtaining a benefit.[154]

3.115 'Private sexual material' is defined as material depicting someone engaged in, or appearing to be engaged in, a sexual pose or sexual activity; or a sexual organ or anal region of a person or the breasts of a female person.[155] It does not cover material that has been altered where the alteration is what defines it as 'private sexual material', or where the alteration is what depicts the subject person.

3.116 The bill is yet to be considered by the Parliament, but the Federal Minister for Women, the Hon Michaelia Cash MP, has been reported as stating that the issue of technology-related abuse, including revenge pornography, is on the government's agenda and that following agreement by the Council of Australian Governments, a review of Commonwealth, state and territory legislation is being undertaken 'to ensure it adequately criminalises the distribution of intimate material … without the victim's consent'.[156]

152 *Summary Offences Act 1966* (Vic), ss 41A, 41B and 41C respectively.

153 *Hansard*, Australian House of Representatives, 12 October 2015, p 10694 (Tim Watts).

154 Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth), ss 474.24E, 474.24F and 474.24G.

155 Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth), ss 474.24D.

156 Jorge Branco, *Revenge porn laws needed 'sooner rather than* later', 7 February 2016, The Sydney Morning Herald Online, http://www.smh.com.au/queensland/revenge-porn-laws-needed-sooner-rather-than-later-20160204-gmm432.html.

3.117 Internationally, a number of jurisdictions have criminalised revenge pornography, including the Philippines, Israel, Japan, Canada, New Zealand, the United Kingdom and 26 states in the United States.[157]

Committee comment

3.118 Developments in Australia and internationally across both the civil and criminal law are indicative of increasing public recognition of 'privacy' as an important asset and the public interest in protecting it.

3.119 The committee notes that in some overseas jurisdictions, notably in the United Kingdom and New Zealand, the existence of human rights frameworks that recognise an individual's right to privacy have contributed to the development of common law torts that operate to protect against invasions of privacy or to redress them when they occur. Unfortunately, however, Australia does not have a human rights bill or other comprehensive human rights protection legal system as exists in those jurisdictions.

3.120 The committee acknowledges the developments in other Australian jurisdictions of the criminal law targeting revenge pornography. As noted in our earlier comment at 3.51, it was not within our remit to consider the introduction of new criminal offences. However, if the Criminal Code Amendment (Private Sexual Material) Bill 2015 currently before the Australian Parliament is passed it will criminalise revenge across Australia, which is a positive move that would be welcomed by the committee.

3.121 Even if the federal bill is not enacted, however, the committee believes that the introduction of a statutory cause of action for serious invasions of privacy in New South Wales would provide an adequate remedy (and deterrent) for such behaviour. The committee makes a number of recommendations in this regard in the next chapter.

157 Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 3.

Chapter 4 A statutory cause of action for serious invasions of privacy

This chapter discusses the need for a statutory cause of action or statutory tort for serious invasions of privacy in New South Wales. It considers the models for such an action proposed by various law reform commissions, particularly the model proposed by the Australian Law Reform Commission (ALRC) in its 2014 *Serious Invasions of Privacy in the Digital Era* report. The chapter contains numerous recommendations for legislative action in this state.

The need for a statutory cause of action

4.1 The committee's terms of reference require it to consider whether or not statutory cause of action for serious invasions of privacy should be introduced in New South Wales.

4.2 Organisations representing media and arts community interests strongly opposed the need for such an action, arguing that existing remedies provide adequate protection or recourse to those suffering invasion of privacy. Ms Sarah Waladan, Manager of Media Policy and Regulatory Affairs of Free TV Australia, told the committee:

> We are of the view that, in the context of the current framework, a statutory cause of action is unnecessary. There are already a plethora of State and Commonwealth laws that deal with privacy. They sufficiently cover the issues concerned.[158]

4.3 The Arts Law Centre of Australia similarly argued that '[t]he existing remedies for serious invasions of privacy are sufficient'[159], referring to a number of laws relating to privacy as well as developments in case law.

4.4 The joint submission made by media organisations including AAP, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News, detailed various legislative provisions relevant to privacy protection including Commonwealth and state-based privacy and personal information acts; surveillance, listening devices, and telecommunications interception acts; as well as legislation restricting reporting on particular types of matters.[160] The submission also identified common law actions that could offer a remedy to victims of serious invasions of privacy (discussed in chapter 3). In referring to the issues of revenge pornography, drones and neighbourhood surveillance identified in the media release announcing this inquiry, it commented:

> The Media Organisations are of the view that these laws adequately address concerns regarding invasions of privacy. To the extent that specific issues have been cited in the Media Release accompanying the establishment of this inquiry, we would support an approach of investigating the specific issues, including whether or not the plethora of State and Commonwealth laws covering privacy and other issues (for example the

158 Evidence, Ms Sarah Waladan, Manager, Media Policy and Regulatory Affairs, Free TV Australia, 16 November 2015, p 11.

159 Submission 11, Arts Law Centre of Australia, p 3.

160 Submission 22, Joint Media Organisations, pp 1-2.

> *Criminal Code Act 1995*) already address these concerns, and engaging in further discussions about how a targeted and proportionate response might be best achieved.[161]

4.5 However, the vast majority of inquiry participants argued that existing statutory and common law actions fail to provide adequate remedies for serious invasions of privacy, and that a statutory cause of action or statutory tort is needed. For example, Ms Hanna Ryan commented:

> The privacy of Australians and people in New South Wales is currently inadequately protected by a range of different laws and we submit that we need a statutory cause of action to protect the right to privacy.[162]

4.6 Mr Bruce Baer Arnold, Director of the Australian Privacy Foundation reflected on the proposals for a statutory cause of action put forward by various law reform commissions (outlined in the following sections) to state:

> The Foundation calls on the Committee to recommend law reform that specifically deals with serious invasions of privacy. That reform has been proposed in detail by the NSW Law Reform Commission. It has been proposed by the Australian Law Reform Commission. It has been proposed by law reform commissions and parliamentary committees in Victoria and other jurisdictions. Put simply: it is not new, it is not frightening; it is quite achievable.[163]

4.7 Ms Maeve Curry, representing NSW Young Lawyers Communications, Entertainment and Technology Committee, also argued that existing remedies for privacy breaches (particularly the breach of confidence action) were inadequate and noted the strong support for a statutory cause of action by participants in this inquiry:

> … our privacy legislation must be adaptable to emerging technology and unforeseen examples of privacy invasion. The equitable cause of action of breach of confidence does not cover the field of conduct. I understand that is the position of all but three of the submissions to this inquiry – that being that another statutory cause of action is necessary to do that because the equitable cause of action is inadequate to address the wide-ranging and far-reaching harms to victims of this type of harm, and the need to deter perpetrators from engaging in this type of behaviour.[164]

4.8 Dr Normann Witzleb, Associate Professor, Faculty of Law, Monash University summarised five key points of consensus with respect to the contributions to this inquiry in his opening statement to the committee:

> [There is a consensus that] better protection of privacy is needed and it is needed now; a statutory privacy tort is the missing capstone of privacy protection; the protection provided by the tort needs to be accessible to persons of limited financial means; and

161 Submission 22, Joint Media Organisations, pp 1-2.

162 Evidence, Ms Hanna Ryan, Vice President, New South Wales Council for Civil Liberties, 30 October 2015, p 13.

163 Evidence, Mr Bruce Baer Arnold, Director, Australian Privacy Foundation, 30 October 2015, p 52.

164 Evidence, Ms Maeve Curry, Committee Member, Communications, Entertainment and Technology Committee, NSW Young Lawyers, 30 October 2015, p 36.

> the LRC [Australian Law Reform Commission] recommendations for the privacy tort are the most useful template for designing the cause of action.[165]

4.9 Ms Sophie Farthing, Senior Policy Officer from the Public Interest Advocacy Centre, suggested that a statutory cause of action would have a number of benefits, including that it would enhance social norms around the issue of privacy more broadly:

> I think it is quite clear that we would like a statutory cause of action … We think it would provide certainty. We think it would provide remedies where currently there are no remedies. It would provide a change in the social norms around privacy …[166]

Committee comment

4.10 The committee acknowledges the opposition by the media and arts community representatives to the introduction of a statutory cause of action for serious invasions of privacy, which expressed the view that existing state and Commonwealth laws provide adequate remedies for such invasions.

4.11 This view, however, is in stark contrast to the view expressed by the vast majority of inquiry participants who acknowledged that while there are a range of laws that *may* be applicable to particular serious invasions of privacy, there remain significant gaps in the coverage afforded to privacy protection.

4.12 It is clear from the evidence received by this inquiry that the existing privacy framework in New South Wales does not provide adequate remedies to many people who suffer a serious invasion of privacy. The experience of Witness A, discussed in chapter 2, is a striking example of just how inadequate our current laws are.

4.13 The committee considers that the lack of a cause of action that is specifically designed to respond to the harm arising from a serious invasion of one's privacy has resulted in awkward attempts to manipulate privacy claims into other actions that are not intended for that purpose.

4.14 As such, the committee is persuaded that a statutory cause of action should be introduced to provide appropriate redress to people who suffer a serious invasion of privacy.

Recommendation 3

That the NSW Government introduce a statutory cause of action for serious invasions of privacy.

165 Evidence, Dr Normann Witzleb, 16 November 2015, p 22.

166 Evidence, Sophie Farthing, Senior Policy Officer, Public Interest Advocacy Centre, 16 November 2015, p 52.

Models for a statutory cause of action

4.15 As noted in chapter 1, the Australian, Victorian and NSW Law Reform Commissions have examined the law relating to privacy and have each supported the introduction of a statutory cause of action for invasions of privacy.

4.16 In its 2014 report,[167] the ALRC made 52 recommendations which set out a detailed legal design for a statutory civil cause of action for serious invasion of privacy. The ALRC model was the subject of considerable focus during this inquiry.

4.17 The following sections describe some key aspects of the ALRC model, and – where relevant – includes consideration of how it differs from the model proposed in 2009 by the NSWLRC which was set out in a draft bill appended to its report,[168] and the 2010 Victorian Law Reform Commission (VLRC) model.[169]

Scope

4.18 The ALRC supports a statutory cause of action that is relatively narrow in scope in that it would only apply to two categories of invasion of privacy: intrusion upon seclusion; and misuse of private information.

4.19 The ALRC and VLRC both reported that 'intrusion upon seclusion' and 'misuse of private information' are the two most recognised categories of invasion of privacy.[170] The former generally refers to invasions or intrusions into a person's private physical space. The ALRC stated that '[w]atching, listening to and recording another person's private activities are the clearest and most common examples of intrusion upon seclusion.'[171]

4.20 The concept of intrusion upon seclusion has developed significantly in the United States where there is a specific privacy tort for intrusion:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[172]

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167 Australian Law Reform Commission (2014), *Serious Invasions of Privacy in the Digital Era: Report 123* (hereafter referred to as 'ALRC 2014 Report').

168 The Civil Liability Amendment (Privacy) Bill 2009 was appended to the NSW Law Reform Commission report (2009), *Invasion of Privacy*, Report 120 (hereafter referred to as 'NSWLRC 2009 Report'). The bill proposed amendments to the *Civil Liability Act 2002* to give effect to the recommendations in the commission's report.

169 Victorian Law Reform Commission report (2010), *Surveillance in Public Places*, Report 18 (hereafter referred to as 'VLRC 2010 Report').

170 ALRC 2014 Report, p 76; VLRC 2010 Report, p 149.

171 ALRC 2014 Report, p 76.

172 Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 10, quoting s 652B US *Restatement of the Law, Second, Torts* (1977).

4.21 'Misuse of private information' generally refers to cases where there has been an unauthorised disclosure, but can also capture the wrongful obtaining of a person's private information.[173] In the United Kingdom, following the 2004 case of *Campbell v MGN Ltd* (discussed in chapter 3 at 3.90), there is now a recognised basis for action where there is an unauthorised disclosure of private information (although it has developed in common law out of the equitable action of breach of confidence).

4.22 Lord Hoffman commented on the importance of one's private information to their sense of autonomy, stating:

> Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[174]

4.23 By comparison, the ALRC's earlier 2008 report[175] and the NSWLRC's 2009 report supported a broad cause of action that was not limited to invasions of privacy in the nature of intrusion upon seclusion or misuse of private information.

Nature of the cause of action

4.24 If a statutory cause of action for serious invasions of privacy were to be introduced, a key consideration is whether the cause of action ought to be described as an action in tort.

4.25 This issue was considered by the three law reform commissions, with the ALRC in its 2014 report being the only one to recommend a characterisation of the statutory cause of action as an action in tort.[176] It provided six reasons to support this, which were that a tort would:

- provide certainty about a range of ancillary issues
- allow the application of common law principles settled in analogous tort claims
- mirror the approach taken in comparable jurisdictions, thus enabling Australian courts to draw on analogous external case law
- clarify and highlight distinctions between the statutory cause of action for invasion of privacy and existing regulatory regimes
- differentiate it from equitable and contractual actions for breach of confidence
- not constrain the legislature, by mere fact of its characterisation as an action in tort, from providing for remedies not generally available in tort at common law.[177]

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173 ALRC 2014 Report, p 81.

174 *Campbell v MGN Ltd* [2004] 2 AC 457, [51].

175 Australian Law Reform Commission (2008), *For Your Information: Privacy Law and Practice*, Report 108.

176 ALRC 2014 Report, Recommendation 4-2.

177 ALRC 2014 Report, pp 68-70.

4.26 In contrast, the VLRC, NSWLRC and the ALRC in its 2008 report all recommended a statutory cause of action, but not a statutory tort.[178] The NSWLRC, in recommending against identifying the cause of action as an action in tort, asserted two key bases for doing so. The first basis being that torts do not require the court to balance other interests in assessing whether there is an action; the second being that it did not consider it necessary for the cause of action to be restricted by rules applicable to tort law:

> … tortious causes of action do not generally require the courts to engage in an overt balancing of relevant interests … in order to determine whether or not the elements of the cause of action in question are satisfied … [T]he statutory cause of action should not necessarily be constrained by rules or principles generally applicable in the law of torts.[179]

4.27 While initially indicating support for a privacy action described as a cause of action in tort, Dr Witzleb submitted that it was not a critical matter because it is up to the courts to determine how to apply the law, based on established statutory interpretation principles:

> In reality, the matter of whether the statutory cause of action is identified as a tort, or not, is not as significant as a reading of the reports of either Commission might suggest. The reason for this is as follows: A court is neither precluded from applying a rule that makes reference to a 'tort' when dealing with a statutory cause of action not expressly identified as a statutory tort. Nor will a court automatically and unquestioningly apply to a statutory privacy wrong a rule that makes reference to a 'tort' solely because the statutory action is described in the Act as a tort. In either case, the court will be guided in its application of the law by principles of statutory interpretation as well as the doctrine of precedent [citation omitted].[180]

Fault element

4.28 In the various examinations by the law reform commissions on the question of the fault element, there was consensus that an invasion of privacy should attract liability if it is done intentionally or if it is reckless, however there was some divergence on the question of whether negligent acts should be included.

4.29 The ALRC discussed the threshold of intention or recklessness in its 2014 report, stating:

> There is little argument against the proposition that [the tort] … should be actionable where the defendant has intentionally invaded the privacy of the plaintiff. Deliberate and unjustifiable invasions of an individual's privacy are clearly culpable and beyond what any person should be expected to endure in the ordinary circumstances and exigencies of everyday life or from their interactions with others in society [citations omitted].[181]

178 Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, p 27; Submission 29, Department of Justice, NSW Government, p 13.

179 NSWLRC 2008 Report, p 50.

180 Answers to questions on notice, Dr Normann Witzleb, 7 January 2016, p 12.

181 ALRC 2014 Report, p 112.

4.30 It went on to note that intentional or reckless conduct clearly falls within the protection intended by Article 17 of the International Convention on Civil and Political Rights,[182] and that most jurisdictions with a tort for invasion of privacy require that the conduct be intentional or reckless.[183]

4.31 The ALRC recommended that the action be confined to intentional or reckless invasions of privacy.[184] It did not support an extension of application of the tort to conduct that is negligent, commenting that it should not be actionable where there is merely an intention to do an act that has the inadvertent consequence of invading a person's privacy. The commission explained, 'it may be quite common to intend an action that will have the consequence of invading someone's privacy, without intending to invade their privacy'. [185]

4.32 In a 2007 consultation paper issued as part of its review into invasion of privacy, the NSWLRC suggested that 'including liability for negligent or accidental acts in relation to all invasions of privacy would, arguably, go too far'.[186] However, in its 2009 report on the review, the commission did not restrict its proposed cause of action in this way, preferring to leave it open to unintentional invasions of privacy.[187] Nonetheless the NSWLRC did comment that, in its view, 'liability will generally arise … only where the defendant has acted intentionally'[188] and that it considered the question of whether negligent conduct met the relevant threshold for liability to arise was 'a matter appropriately left to development in case law.'[189]

4.33 Some participants to this inquiry considered there was merit in creating a statutory cause of action that captured negligent invasions.[190] The Australian Privacy Foundation, for example, submitted that 'there is no sound legal or policy basis for limiting the scope of the action to either intentional or reckless acts rather than incorporating negligent acts.'[191]

4.34 Similarly, Dr Witzleb supported a cause of action that captured negligent invasions, commenting:

> … there are cases where privacy invasions have been committed negligently but they still have very serious consequences and people that would be the victim of those

182 ALRC 2014 Report, p 112.

183 ALRC 2014 Report, p 112.

184 ALRC 2014 Report, Recommendation 7-1.

185 ALRC 2014 Report *123*, p 115.

186 New South Wales Law Reform Commission (2007) *Invasion of Privacy, Consultation Paper 1*, p 7.

187 See Submission 29, Department of Justice, NSW Government, p 14. See also NSWLRC 2008 Report, p 50. Generally speaking, intentional torts are a *deliberate* interference with a legally recognised interest, and as a consequence damages available tend to be more generous than for negligent torts. Negligent torts occur when a defendant's actions were unreasonably unsafe.

188 NSWLRC 2008 Report, p 50.

189 NSWLRC 2008 Report, p 50.

190 Answers to questions on notice, Ms Anna Salinger, Director, Salinger Privacy, 20 November 2015, p 1; Answers to questions on notice, Australian Privacy Foundation, 15 December 2015, p 1; Evidence, Dr Witzleb, 16 November 2015, p 23.

191 Answers to questions on notice, Australian Privacy Foundation, 15 December 2015, p 1.

> privacy invasions would be without redress if the invasion depended on the defendant having acted with intentional recklessness.[192]

4.35 The NSW Council for Civil Liberties, in support of an action that would capture negligent invasions, cited an example demonstrating the inadequacy of such an action if it did not capture negligent actions:

> The Department of Immigration last year published details of 10,000 or so asylum seekers in circumstances where those personal details were available on the internet for anyone to view. There must have been a human error somewhere but that occurred as a failure of complex IT systems which resulted in that publication … That is an example of where there can be very serious consequences for breach of privacy and unwarranted disclosure of personal information in circumstances where there may have been no negligence and no easy ability to find recklessness or other breaches.[193]

4.36 Ms Hanna Ryan, Vice President of the NSW Council for Civil Liberties, pointed out the unlikelihood of big data breaches such as this meeting an intention or recklessness threshold:

> [I]n those situations of mass data breach or where there is a big set of data that has been lost control of you are never going to be able to meet the standard of recklessness or intention. As big data develops that kind of risk grows ever more. I think it is worth responding to it.[194]

4.37 Mr Stephen Blanks, President of the NSW Council for Civil Liberties, submitted that the action should focus on 'the disclosure and the consequence rather than exactly how it occurred.'[195]

4.38 However, a number of other inquiry participants considered it would be 'unfair'[196] to attribute civil liability to individuals who negligently committed a serious invasion of privacy.[197]

4.39 One idea canvassed during the inquiry was for different fault standards to apply to corporations and governments than to individuals. This was supported by NSW Young Lawyers, which noted that corporations and governments have a greater capacity to safeguard information and that the information they hold is likely to have the potential to cause greater damage, thus justifying a higher responsibility:

> A major factor in considering such a wider fault element would be that corporations are more likely to have the resources to access more sophisticated equipment and technology to collect and maintain private material, and a breach could therefore have broader consequences, so implementing additional safeguards and/or processes to avoid a negligent invasion of privacy would be relatively less burdensome on the

192 Evidence, Dr Witzleb, 16 November 2015, p 23.

193 Evidence, Mr Stephen Blanks, President, NSW Council for Civil Liberties, 30 October 2015, p 16.

194 Evidence, Ms Ryan, 30 October 2015, p 16.

195 Evidence, Mr Blanks, 30 October 2015, p 17.

196 Answers to questions on notice, Drs Henry and Powell, 24 November 2015, p 2.

197 Answers to questions on notice, Drs Henry and Powell, 24 November 2015, p 2; Answers to questions on notice, Mr Chris Chow, Chair NSW Young Lawyers" Communication, Entertainment & Technology Law Committee; Ms Renée Bianchi, President, NSW Young Lawyers, 18 December 2015, p 1.

> corporation (compared with an individual). With that increased capacity to implement safeguards and/or processes, should potentially come a higher level of responsibility. It is also arguable that the consequences of a negligent breach of privacy by a corporation could be more serious and/or widespread than that of an individual: compare, for example, a negligent breach by a news corporation, with circulation to millions, to that of an individual on Facebook with 300 friends.[198]

4.40 Dr Witzleb also expressed support for the protection offered by such a distinction, stating that it:

> … provides a deterrent against corporate carelessness, while dealing with the concern that imposing liability on individuals for simple lack of care may have undesirable consequences.[199]

4.41 Dr Witzleb noted that while the ALRC restricted its fault element to intentional and reckless invasions, it also acknowledged the need to ensure a strong response by the law to negligent data breaches by corporations.[200]

4.42 Ms Hanna Ryan, Vice President of the NSW Council for Civil Liberties, made a similar point, noting the unlikelihood of big data breaches meeting an intention or recklessness threshold:

> [I]n those situations of mass data breach or where there is a big set of data that has been lost control of you are never going to be able to meet the standard of recklessness or intention. As big data develops that kind of risk grows ever more. I think it is worth responding to it.[201]

'Reasonable expectation of privacy'

4.43 All of the law reform commission proposals recommended an objective test conceptualised on a 'reasonable expectation of privacy'. The NSWLRC proposal provides that to establish the basis for a claim, two key elements should be present: 'first there must be facts in respect of which, in all the circumstance of the case, there is a reasonable expectation of privacy on the part of the plaintiff', and also that any claim for protection of privacy must not be of lesser value than any competing public interest in the same circumstances.[202] It proposed that both elements would be necessary to establish the basis for a claim in the first instance.

4.44 The ALRC recommended that a plaintiff be required to establish that a person in their position would have had a reasonable expectation of privacy in all the circumstances.[203] It provided for a separate public interest test, which required a 'court to be satisfied that the public interest in privacy outweighs any countervailing interest.'[204] However, it acknowledged that:

198 Answers to questions on notice, Mr Chow and Ms Bianchi, 18 December 2015, p 1;

199 Answers to questions on notice, Dr Witzleb, 11 January 2016, p 10.

200 Answers to questions on notice, Dr Witzleb, 11 January 2016, p 9.

201 Evidence, Ms Ryan, 30 October 2015, p 16.

202 NSWLRC 2008 Report, p 22.

203 ALRC 2014 Report, pp 92-94.

204 ALRC 2014 Report, Recommendation 9-1.

> In some cases, a public interest matter will be so conspicuous that it may not be sensible to ignore it when determining whether the plaintiff has a reasonable expectation of privacy.[205]

Seriousness

4.45 There were differences in the approach of the law reform commissions in regard to the seriousness threshold. The NSWLRC did not restrict the proposed cause of action to 'serious' invasions of privacy:

> Submissions made to us … argued that a general cause of action for invasion of privacy is warranted because it specifically recognises the value of privacy as such, and fills gaps in the existing legal protection of privacy [citations omitted].[206]

4.46 The ALRC, although taking a different approach to the NSWLRC by supporting a threshold for seriousness, noted that in the four Canadian provinces that had legislated for a statutory cause of action, none contained such a threshold.[207] It also commented that some of its stakeholders argued that a reasonable expectation of privacy was all that a person should need to establish to commence an action.[208]

4.47 Some of the ALRC's review participants went so far as to suggest the additional 'seriousness' threshold was 'unnecessary and arbitrary'.[209] Others, however, supported an additional threshold. Some recommended the action should apply to 'highly offensive' invasions of privacy, while others suggested that the threshold should be high so that it would not 'undermine freedom of expression and the media.'[210]

4.48 The ALRC emphasised that the intention of its proposed tort was to provide a civil remedy to people who suffered a *serious* invasion of privacy. It ultimately concluded that an 'additional and discrete threshold of seriousness would provide an additional means of discouraging people from bringing [trivial] actions,'[211] and recommended that legislation provide specific guidance on the meaning of 'serious'. [212]

Proof of damage

4.49 None of the proposals required that a claimant prove damage before they could bring an action. The ALRC commented that, under its proposal, a plaintiff would already have to establish first that the invasion of privacy was serious; and second that the defendant invaded their privacy intentionally or recklessly. It considered that in those circumstances 'a plaintiff

205 ALRC 2014 Report, p 96.
206 NSWLRC 2008 Report, pp 8-9.
207 ALRC 2014 Report, p 133.
208 ALRC 2014 Report, pp 132-133.
209 ALRC 2014 Report, p 133.
210 ALRC 2014 Report, p 133.
211 ALRC 2014 Report, p 134.
212 ALRC 2014 Report, pp 134- 135.

should not also have to prove that they suffered actual damage. The tort should be actionable per se.'[213]

4.50 In making that recommendation, the ALRC commented that while many invasions of privacy may result in emotional distress, shame or humiliation, they often do not meet the threshold requirement for 'actual damage' that the law has traditionally provided a remedy to:

> Making the tort actionable per se, like an action in trespass, will enable the plaintiff to be compensated for emotional distress caused by the defendant's intentional or reckless conduct.[214]

4.51 The NSWLRC proposal did not need to specify whether proof of damage was required, as it was designed as a statutory cause of action, and not as a tort. This is because 'the requirement is inapposite to the statutory cause of action, which is designed primarily to protect the plaintiff from suffering non-economic loss, including mental distress.'[215] The NSWLRC explained:

> If the action were tortious, it would be necessary to decide the issue since torts are either actionable on proof of damage (as in negligence) or without proof of such damage ("per se") (as in trespass).[216]

National uniformity

4.52 Both the ALRC and the NSWLRC acknowledged the importance of national uniformity in privacy laws, including those relating to a statutory cause of action.

4.53 The NSWLRC recommended the adoption of its draft bill nationally:

> Recognising that the province of private law is foremost a matter of State law within Australia's federal system, our preferred model for achieving uniformity is for State and Territory legislatures to enact the Bill attached to this report.[217]

4.54 The NSWLRC noted that such an approach would require all jurisdictions to agree on its proposed provisions for a statutory cause of action, and incorporate 'substantially uniform provisions'[218] within existing state or territory based legislation. It recommended the *Civil Liability Act 2002* (NSW) as an appropriate vehicle for this jurisdiction.

4.55 The ALRC, on the other hand, recommended that any statutory cause of action for serious invasion of privacy should be enacted by the Commonwealth[219]on the basis that '... this is the best way to ensure the action is available and consistent throughout Australia.'[220]

213 ALRC 2014 Report, p 131.

214 ALRC 2014 Report, p 131.

215 NSWLRC 2008 Report, p 51.

216 NSWLRC 2008 Report, p 51.

217 NSWLRC 2008 Report, p 73.

218 NSWLRC 2008 Report, p 73.

219 ALRC 2014 Report, Recommendation 4-1.

220 ALRC 2014 Report, p 60.

Forums

4.56 The ALRC acknowledged the need to provide a range of forums for claimants wishing to pursue a civil remedy for a serious invasion of privacy. It recommended:

> Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the Act. Consideration should also be given to giving jurisdiction to appropriate state and territory tribunals.[221]

4.57 It commented that there had been a range of other inquiries that had acknowledged the appropriateness and potential for tribunals to hear actions for serious invasions of privacy, and further that there was 'general agreement' amongst stakeholders for 'low cost forums.'[222]

4.58 Inquiry participants were supportive of any statutory cause of action for serious invasions of privacy being widely accessible. A number of participants espoused an appropriately resourced complaints model,[223] while others supported a tribunal type model such as the NSW Civil and Administrative Tribunal (NCAT).[224] The NSW Law Society expressed some support for courts to be the primary forum for privacy actions because of the certainty of outcomes and the lack of resourcing of non-judicial bodies.[225]

4.59 Other stakeholders supported a regime that offered a suite of avenues for people to access, on the basis that this offered flexibility for people to seek individualised justice. For example, the Privacy Commissioner suggested that any statutory cause of action should be:

> … complemented by a complaints model, broadening the role of Privacy Commissioner to allow allegations to be investigated and appropriate determinations made. Determinations could be referred to a court or tribunal for review. The NSW Civil and Administrative Tribunal could play an important role in contested disputes.[226]

4.60 In indicating support for a complaints model, the Australian Information Commissioner, Mr Timothy Pilgrim PSM, highlighted the benefits of such a model:

> [A complaints model] would be more accessible [than initiating court proceedings] to individuals and would encourage informal and low-cost resolution of disputes through conciliation. A court proceeding may be an option at a later stage in resolving a grievance.[227]

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221 ALRC 2014 Report, Recommendation 10-1.

222 ALRC 2014 Report, p 167.

223 Evidence, Dr Elizabeth Coombs, NSW Privacy Commissioner, 30 October 2015, p 4; Submission 16, Office of the Australian Information Commissioner, pp 1-2; Evidence, Professor Barbara McDonald, Australian Law Reform Commission, 30 October 2015, p 22; pp 24-25.

224 See, for example, Evidence, Dr Coombs, 30 October 2015, p 6; Ms Elizabeth Tydd, NSW Information Commissioner, 30 October 2015, p 11; Evidence, Ms Anna Johnston, Director, Salinger Privacy, 16 November 2015, p 36. Evidence, Ms Farthing, 16 November 2015, p 50.

225 Answers to questions on notice, J F Eades, President, NSW Law Society, p 3.

226 Answers to questions on notice, Dr Elizabeth Coombs, NSW Privacy Commissioner, 25 November 2015, p 2.

227 Submission 16, Office of the Australian Information Commissioner, pp 1-2.

4.61 The NSW Council for Civil Liberties noted that the NCAT already has jurisdiction to determine private disputes, and that it is accustomed to dealing with complaints by private individuals in which a conciliation by a government agency has already been attempted.[228]

4.62 In response to questioning from the committee, Ms Farthing from the Public Interest Advocacy Centre agreed that there was merit in a framework that offered the following three pathways for redress:

- a complaints mechanism to an adequately resourced Privacy Commissioner with some determinative powers
- the option of taking a claim to the NCAT for a low-cost adjudicative remedy
- the option of bringing an action to a court of competent jurisdiction.[229]

4.63 Ms Farthing emphasised the importance of potential plaintiffs having choice when it came to deciding how to pursue redress:

> We do not support having it made a compulsory process that you must go here first before you go there. With the nature of privacy invasion being individualised, the option should be available to complainants to take the course of action they want to pursue. That could be set up in any legislative framework you come up with.[230]

Defences and exemptions

4.64 The ALRC model included a number of defences to the proposed statutory cause of action, including a defence of fair report of proceedings of public concern,[231] and an exemption for children and young people.[232]

4.65 It also recommended that the cause of action require a plaintiff to establish that the public interest in privacy outweighs any countervailing public interest and that the legislation include a list of 'countervailing public interest matters which a court may consider' when considering whether that condition is met.[233] The list includes the public interest in freedom of expression, including political communication and artistic expression and freedom of the media.

4.66 The Arts Law Centre welcomed the ALRC's recommendation to invite courts to balance the public interest in artistic expression with any privacy interest, but asserted that any statutory cause of action should be stronger and 'direct a court to consider the various public interest criteria, rather than invite it to do so.'[234]

228 Answers to questions on notice, NSW Council for Civil Liberties, 26 November 2015, p 7.

229 Evidence, Ms Farthing, 16 November 2015, p 50.

230 Evidence, Ms Farthing, 16 November 2015, p 50.

231 ALRC 2014 Report, Recommendation 11-7.

232 ALRC 2014 Report, Recommendation 11-8.

233 ALRC 2014 Report, Recommendations 9-1 and 9-2(a).

234 Answers to questions on notice, Arts Law Centre of Australia, 4 December 2015, pp 2-3.

Legislative action

4.67 It is clear that there has been considerable work done by a number of eminent inquiry bodies in recent years, with each supporting the enactment of a statutory cause of action for serious invasions of privacy. Despite this, no government has acted to introduce legislation in New South Wales or in other Australian jurisdictions to give effect to these recommendations.

4.68 The majority of inquiry participants were adamant that what is required now is legislative action. References were made to the comprehensive body of work already done by various law reform commissions and to reform that has occurred in other jurisdictions that offer privacy enhanced protection or remedy in the case of serious invasion. In this context, some stakeholders expressed frustration at the lack of action by consecutive governments at state and national levels:

> We've been on this merry-go-round before. The ink is barely dry on the comprehensive, considered and balanced review conducted on this very topic by the Australian Law Reform Commission. The NSW Law Reform Commission also had a swing at this topic a few years back. Nothing has changed. No new laws, no new remedies … my answer is yes. YES. Yes, we need better remedies for invasions of privacy. Because the law is failing us now.[235]

4.69 Inquiry participants largely supported implementation of the ALRC's 2014 model. While some suggested certain minor amendments to it such as, for example, expanding it to include negligent conduct[236] or incorporating consideration of other public interests into a defence rather than incorporating it into the cause of action,[237] in general they thought the model offered a good starting point.

4.70 For instance, Mr Edward Santow, Chief Executive Officer of the Public Interest Advocacy Centre, said that even without the minor refinements suggested by his organisation it would be preferable to adopt the model as is rather than continue to do nothing:

> We are broadly in support of the enactment of a statutory cause of action along the lines of the ALRC. Based on our experience we are offering some refinements or improvements that would take a good model and make it better. But we have to remind ourselves: What are we comparing? We are comparing a current situation where there is no legislative protection with various models that would all be preferable to the current situation ... Doing nothing is significantly worse than the main orthodox legislative proposals before this Committee. [238]

235 Submission 8, Salinger Privacy, p 2.

236 Evidence, Ms Farthing, 16 November 2015, p 51; Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW, p 42; Evidence, Dr Witzleb, 16 November 2015, p 23.

237 Submission 10, Australian Lawyers Alliance, p 9; Evidence, Ms Farthing, 16 November 2015, p 51; Evidence, Ms Ryan, 30 October 2015, p 13.

238 Evidence, Mr Edward Santow, Chief Executive Officer, Public Interest Advocacy Centre, 16 November 2015, p 51. The 'refinements' supported by PIAC relate to an extension of the cause of action to cover negligent invasions, and providing for public interest matters to be considered as a defence, as opposed to it being a incorporated into the cause of action.

4.71 The Australian Lawyers Alliance also indicated support for the ALRC's model 'in the main', and commented that it provides a 'clear and well-reasoned basis for enactment of a New South Wales Act providing for a tort of that nature.'[239]

4.72 The Arts Law Centre of Australia submitted that while it remains opposed to a statutory cause of action for invasions of privacy, the 'relatively narrow construction of [the ALRC model] could limit the potential scope for liability under such a cause of action, the damages sought, and unmeritorious claims being brought.'[240]

4.73 The NSW Council for Civil Liberties highlighted the public interest element in the ALRC model, which it pointed out would protect freedom of expression to the benefit of media and arts organisations:

> As a civil liberties organisation our interest is not just in privacy. We are also strong defenders of the right to freedom of expression which can come into conflict with the right to privacy. We think that a public interest element to this cause of action will be sufficient to protect that interest. We note that although the media organisations have opposed a statutory cause of action in their submission, any action under the breach of confidence as it currently stands, or other forms of privacy protection, do not have a public interest defence.[241]

4.74 In regard to uniformity across jurisdictions, Mr Kirk McKenzie, Chair of the Human Rights Committee at the NSW Law Society acknowledged that federal legislative reform was desirable, however, given the lack of political will nationally he recommended that New South Wales lead the way for other states to follow:

> In view of the fact that the New South Wales Parliament has the power to introduce such legislation, it should not be afraid of doing it. It could well take a lead in this area. It was not so long ago that the New South Wales Parliament was the most important Parliament in this country. The Premiers of this State until World War II practically exercised more power than the Prime Minister. The Parliament still has that power—it has not been taken away. This is the sort of legislation where, if the New South Wales Parliament took heed of the Law Reform Commission's recommendations and implemented an appropriately judged Act, it could well provide a lead to the other States and Territories.[242]

4.75 A similar view was put by Dr David Vaile, Vice President of the Australian Privacy Foundation:

> The New South Wales Parliament does have the power to effectively address serious invasions of privacy that occur within the State irrespective of whether those invasions occur in cyberspace using technology such as smartphones or involve traditional offences such as peeping Toms. We advocate practical and widely applicable remedies for serious invasions of privacy so that the people of New South Wales do not have to involve the police in most cases. You should not pass the buck

239 Submission 10, Australian Lawyers Alliance, pp 8- 9.

240 Answers to questions on notice, Arts Law Centre of Australia, 4 December 2015, p 2.

241 Evidence, Ms Ryan, 30 October 2015, p 13.

242 Evidence, Mr McKenzie, 30 October 2015, p 36.

> to Malcolm Turnbull and expect the Commonwealth to solve the problems of New South Wales.[243]

4.76 As noted by the Privacy Commissioner, New South Wales has previously been a leader in privacy protection, when in 1975 'it acted as a catalyst for the introduction of [privacy] legislation throughout Australia.'[244]

4.77 In regard to implementing the ALRC model, the NSW Young Lawyers Communication, Entertainment and Technology Law Committee noted that its members comprise a cross-section of lawyers currently working or holding an interest in these fields of law to state:

> [Even though our members] have differing views on alternatives to courts being the primary place where serious invasions of privacy rights are vindicated … The one theme that appears consistent throughout the majority of the Committee's members is that the introduction of laws protecting against serious invasions of privacy is overdue, and the Committee is of the view that the implementation of the Bill put forward by the ALRC should be a priority.[245]

Committee comment

4.78 The committee acknowledges the significant work done by the Australian and New South Wales law reform commissions in recent years, which has included comprehensive consultation with key stakeholders. We note that both bodies developed detailed models for a statutory cause of action to respond to serious invasions of privacy, but despite this, no government has legislated to enact privacy protection in line with those recommendations.

4.79 The committee considers that the lack of development of the common law (discussed in chapter 3) and the lack of political will federally to enact a statutory cause of action suggests that little will happen if New South Wales were to continue to wait for change at a federal level. The committee agrees with the majority of inquiry participants that, while a national approach to privacy protection would be desirable, the broader policy interest in providing an adequate response to serious invasions of privacy warrants New South Wales taking the lead on the issue and legislating for a statutory cause of action itself. Indeed the committee hopes that, with the enactment of a statutory cause of action, New South Wales would lead the way with other jurisdictions to follow suit.

4.80 The committee notes that most inquiry participants regarded the ALRC report to be both well-considered and balanced. We agree, and recommend that the model for the statutory cause of action at recommendation 3 be based on the ALRC model proposed in its 2014 report.

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243 Evidence, Dr David Vaile, Vice President, Australian Privacy Foundation, 30 October 2015, p 52.

244 Evidence, Dr Coombs, 30 October 2015, p 3.

245 Answers to questions on notice, Mr Chow and Ms Bianchi, 18 December 2015, p 6.

Recommendation 4

That in establishing the statutory cause of action at recommendation 3, the NSW Government base the action on the Australian Law Reform Commission model, detailed in its 2014 report, *Serious Invasions of Privacy in the Digital Era*.

4.81 The committee notes that some stakeholders suggested that the model could be improved either through minor refinements to the fault element and/or to managing other public interests. However, with the exception of the fault element, the committee did not receive enough evidence regarding the individual elements of the ALRC's proposed model to make recommendations of this level of detail.

4.82 In regard to the fault element, on the other hand, the committee received significantly more evidence on this matter. We believe that a statutory cause of action with a wider fault element for governments and corporations (encompassing intent, recklessness *and* negligence) and a more limited fault element for individuals (encompassing only intent and recklessness) is an appealing option, and one that warrants consideration by the NSW Government.

Recommendation 5

That in establishing the statutory cause of action at recommendation 3, the NSW Government should consider incorporating a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons.

4.83 In regard to access to the statutory cause of action, the committee acknowledges the comments of various inquiry participants that there is merit in providing a framework that caters for various avenues of redress including through a complaints mechanism, access to an appropriate tribunal, and making a claim through a court of relevant jurisdiction.

4.84 The committee agrees that it is important that individuals aggrieved through a serious invasion of privacy have access to a suite of avenues that offer a range of alternative outcomes to redress the harm caused. It considers that there is particular merit in having a complaints model that allows individuals to take a private complaint to an adequately resourced and empowered Privacy Commissioner.

4.85 The committee considers that it would be appropriate for the role of the NSW Privacy Commissioner to include scope to hear and determine complaints between individuals relating to alleged serious invasions of privacy. The committee is of the view that a complaints model such as this could be further strengthened if the Privacy Commissioner had determinative powers to make orders that involve non-financial forms of redress such as apologies, take-down orders and cease and desist orders. In support of this recommendation, we understand that the Federal Privacy Commissioner has determinative powers under s 52 of the *Privacy Act 1988* (Cth).

Recommendation 6

That the NSW Government:

a) broaden the scope of the NSW Privacy Commissioner's jurisdiction to enable the Commissioner to hear complaints between individuals relating to alleged serious invasions of privacy;

b) empower the NSW Privacy Commissioner to make determinations that involve non-financial forms of redress, including apologies, take down orders and cease and desist orders

c) ensure that the NSW Privacy Commissioner is empowered to refer a complaint on behalf of a complainant to the NSW Civil and Administrative Tribunal for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take down orders and cease and desist orders, and

d) ensure that the Office of the NSW Privacy Commissioner is adequately resourced to enable it to fulfil its functions arising from the expanded scope to deal with complaints arising from alleged serious invasions of privacy.

4.86 Finally, the committee notes the comments of the NSW Council for Civil Liberties that the NCAT already has jurisdiction to determine private disputes in other areas, and that it has experience in dealing with complaints by private individuals in circumstances where conciliation by a government agency has already been attempted but has failed.

4.87 The committee agrees that the NSW Civil and Administrative Tribunal offers an appropriate mid-range option that falls between a complaints mechanism and a court process for serious invasions of privacy, and recommends that it also be conferred with jurisdiction to hear such matters.

Recommendation 7

That the NSW Government confer jurisdiction on the NSW Civil and Administrative Tribunal to enable it to hear claims (in addition to ordinary civil courts) arising out of the statutory cause of action for serious invasions of privacy at recommendation 3.

Appendix 1 Submission list

No	Author
1	Ms Miriam Cullen
2	Mr George Nawar – Partially confidential
3	Mr Greg Piper MP
4	Australian Law Reform Commission
5	Mr Seppy Pour – Partially confidential
6	Name suppressed
7	Name suppressed
8	Salinger Privacy
9	Public Interest Advocacy Centre
10	Australian Lawyers Alliance
11	Arts Law Centre of Australia
12	Mr Rhys Michie
13	Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn
14	Confidential
14a	Confidential
15	The Law Society of New South Wales
16	Office of the Australian Information Commissioner
17	Mr Dominic WYkanak
18	Name suppressed
19	Name suppressed
20	Free TV Australia
21	Pacific Privacy Pty Ltd
22	Media Organisations - AAP, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News
23	Ms Sandra Ernst
24	Australian Privacy Foundation
25	NSW Young Lawyers, Communications, Entertainment & Technology Committee
26	NSW Council for Civil Liberties
27	Information and Privacy Commission NSW
28	Civil Aviation Safety Authority
29	Department of Justice, NSW Government

No	Author
30	A/Prof Dr Normann Witzleb
31	Office of the Privacy Commissioner
32	Women's Legal Services NSW
33	Name suppressed

Appendix 2 Witnesses

Friday 30 October 2015 **Macquarie Room, Parliament House, Sydney**	Dr Elizabeth Coombs	NSW Privacy Commissioner, Office of the Privacy Commissioner
	Ms Elizabeth Tydd	CEO and NSW Information Commissioner, Information and Privacy Commission NSW
	Mr Stephen Blanks	President, NSW Council for Civil Liberties
	Ms Hanna Ryan	Member , Council for Civil Liberties Executive
	Mr Jared Boorer	Principal Legal Officer , Australian Law Reform Commission
	Professor Rosalind Croucher AM	President, Australian Law Reform Commission
	Professor Barbara McDonald	Former Commissioner of the Australian Law Reform Commission,
	Dr Nicola Henry	Senior Lecturer, Legal Studies, Departent of Social Sciences and Commerce, La Trobe University, RMIT University, Monash University
	Dr Anastasia Powell	Senior Lecturer, Justice and Legal Studies, RMIT University
	Mr Kirk McKenzie	Chair, Law Society's Human Rights Committee, The Law Society of NSW
	Mr Chris Chow	Chair, Communications, Entertainment and Technology Committee, NSW Young Lawyers
	Ms Maeve Curry	Committee Member, Communications, Entertainment and Technology Committee, NSW Young Lawyers
	Ms Alexandra Davis	Solicitor, Women's Legal Services
	Ms Liz Snell	Law Reform and Policy Coordinator, Women's Legal Services NSW
	Mr Bruce Baer Arnold	Director, Australian Privacy Foundation
	Asst Prof David Vaile	Vice-Chair, Australian Privacy Foundation
	In-camera Witness A	

Monday 16 November 2015 **Parliament House, Sydney** **Parliament House**	Ms Robyn Ayres	Executive Director, Arts Law Centre of Australia
	Ms Jennifer Arnup	Lawyer, Arts Law Centre of Australia
	Mr Chris Shain	Photographer, Arts Law Centre of Australia
	Ms Sarah Waladan	Manager of Media Policy & Regulatory Affairs, Free TV Australia
	Ms Sarah Kruger	Head of Legal and Regulatory Affairs, Commercial Radio Australia Limited; and member of Joint Media Organisations group
	A/Prof Dr Normann Witzleb	Associate Professor, Faculty of Law, Monash University
	Ms Anna Johnston	Director, Salinger Privacy
	Mr Edward Santow	Chief Executive Officer, Public Interest Advocacy Centre
	Ms Sophie Farthing	Senior Policy Officer , Public Interest Advocacy Centre
	In-camera Witness A	

Appendix 3 Tabled documents

30 October 2015
Public hearing, Macquarie Room, Parliament House

1. Document entitled 'Legislative Council Standing Committee on Law and Justice Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales Opening Statement – NSW Privacy Commissioner 30 October 2015', *tendered by Dr Elizabeth Coombs, NSW Privacy Commissioner.*

2. Document entitled 'Digital Harassment and Abuse of Adult Australians: A Summary Report' by Dr Anastasia Powell and Dr Nicola Henry, *tendered by Dr Anastasia Powell, Senior Lecturer, Justice and Legal Studies, RMIT University.*

3. Submission of the Law Council of Australia to Mr Tim Watts MP regarding the *Criminal Code Amendment (Private Sexual Material) Bill, tendered by Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of New South Wales* .

Appendix 4 Answers to questions on notice

The committee received answers to questions on notice from:

- Free TV Australia
- Women's Legal Service NSW
- Dr Normann Witzleb, Monash University
- New South Wales Council of Civil Liberties
- Salinger Privacy
- Public Interest Advocacy Centre
- New South Wales Young Lawyers, Communications, Entertainment and Technology Committee
- Law Society of New South Wales
- NSW Information and Privacy Commission
- NSW Information Commissioner
- Dr Elizabeth Coombs, NSW Privacy Commissioner
- Dr Nicola Henry and Dr Anastasia Powell
- Arts Law Centre of Australia
- Professor Barbara McDonald on behalf of the Australian Law Reform Commission
- Australian Privacy Foundation

Appendix 5 Minutes

Minutes no. 2
Wednesday 1 July 2015
Standing Committee on Law and Justice
Room 1254, Parliament House, 3.05 pm

1. Members present
Ms Maclaren-Jones, *Chair*
Ms Voltz, *Deputy Chair*
Mrs Taylor (via teleconference from 3.10 pm)
Ms Faruqi (substituting for Mr Shoebridge)

2. Teleconference issues
Mr Clarke and Ms Taylor attempted to phone in via teleconference, however, were unable to connect due to technical issues. Mrs Taylor was subsequently able to connect through a different number.

3. Apologies
Mr Mookhey

4. Draft minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 1 be confirmed.

5. ***

6. Inquiry into remedies for the serious invasion of privacy in New South Wales

6.1 Terms of reference
The committee noted the following terms of reference referred by the House on 24 June 2015:

That the Standing Committee on Law and Justice inquire into and report on remedies for the serious invasion of privacy in New South Wales, and in particular:

(a) the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence,

(b) whether a statutory cause of action for serious invasions of privacy should be introduced, and

(c) any other related matter.

6.2 Proposed timeline

Resolved, on the motion of Ms Voltz: That the committee adopt the following timeline for the administration of the inquiry:

Call for submissions	1 July 2015
Submissions due	4 September 2015
Hearings	October or November 2015
Table report	Mid-February 2016

6.3 Stakeholder list

Mrs Taylor joined the meeting.

Resolved, on the motion of Ms Voltz: That the secretariat email members with a list of stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to nominate additional stakeholders.

6.4 Advertising

Resolved, on the motion of Ms Voltz: That the inquiry be advertised via twitter, stakeholder letters, a media release distributed to all media outlets in New South Wales, and advertisements placed in the Early General News section of the Sydney Morning Herald and Daily Telegraph.

7. Next meeting

The committee adjourned at 3.14 pm, *sine die.*

Teresa McMichael
Committee Clerk

Minutes no. 3
Wednesday 9 September 2015
Standing Committee on Law and Justice
Waratah Room, Parliament House, 1.06 pm

1. Members present

Mrs Maclaren-Jones, *Chair*
Ms Voltz, *Deputy Chair*
Mr Clarke
Mr Searle (participating)
Mr Shoebridge
Mrs Taylor

2. Draft minutes

Resolved, on the motion of Mr Clarke: That draft minutes no. 2 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- ***
- 21 July 2015- Email from Professor Barbara McDonald to Director, offering to provide a briefing to the committee about the Australian Law Reform Commission's 2014 inquiry *Serious Invasions of Privacy in the Digital Era*
- 14 July 2015 – Email on behalf of Commissioner, Australian Federal Police, to Chair, advising that having reviewed the terms of reference they will not be making a submission
- 9 July 2015 – Email from Mr John McDonnell, A/Crown Solicitor, NSW Crown Solicitor's Office to Chair, advising that it will not be making a submission as the issues primarily concern matters of policy.

Sent:

- 22 July 2015 – Correspondence from Chair to Dr Elizabeth Coombs, Privacy Commissioner, requesting a briefing be provided to the committee on privacy laws in New South Wales.

4. ***

5. ***

6. Inquiry into remedies for the serious invasion of privacy in New South Wales

6.1 Public submissions

Resolved, on the motion of Mr Clarke: That the committee note that submissions nos. 1, 3-5 and 8-13 were published by the committee clerk under the authorisation of an earlier resolution.

6.2 Partially confidential submissions

Resolved, on the motion of Shoebridge: That submission nos. 2, 6 and 7 be partially confidential, as recommended by the secretariat, as they contain identifying information.

6.3 Closing date for submissions

The committee noted that the closing date for submissions has been extended until 20 September 2015.

6.4 Briefing from the Privacy Commissioner

Dr Elizabeth Coombs, the Privacy Commissioner, along with her colleague Ms Roxanne Marcelle-Shaw, were admitted to attend the meeting at 1.13 pm.

An informal briefing was provided to the committee by Dr Coombs and Ms Marcelle-Shaw.

7. Next meeting

The committee adjourned at 2.10 pm, *sine die.*

Teresa McMichael
Committee Clerk

Minutes no. 4
Friday 30 October 2015
Standing Committee on Law and Justice
Macquarie Room, Parliament House, Sydney, 10.01 am

1. Members present

Mrs Maclaren-Jones, *Chair*
Ms Voltz, *Deputy Chair*
Mr Clarke
Mr Shoebridge (from 10.05 am)
Mrs Taylor

2. Previous minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 3 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 29 September 2015 – Witness A to Director, requesting that she be able to appear as a witness at a hearing
- 22 September 2015 – Witness A to Director, requesting that her submission be made public
- ***

4. *

5. Inquiry into remedies for the serious invasion of privacy in New South Wales

5.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of an earlier resolution: submission nos 15-17 and 20-32.

5.2 Partially confidential submission

Resolved, on the motion of Mr Clarke: That the committee authorise the publication of submission no. 18, with the exception of identifying and/or sensitive information which are to remain confidential.

5.3 Confidential submission

Resolved, on the motion of Ms Voltz: That the committee keep submission no. 14 confidential, as per the recommendation of the secretariat, as it contains identifying and/or sensitive information.

Mr Shoebridge arrived.

5.4 Additional witness

Resolved, on the motion of Ms Voltz: That the committee invite Mr Seppy Pour to appear as a witness at the 16 November hearing.

5.5 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Dr Elizabeth Coombs, NSW Privacy Commissioner.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Elizabeth Tydd, NSW Information Commissioner.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Stephen Blanks, Secretary, NSW Council for Civil Liberties

- Dr Lesley Lynch, Secretary, NSW Council for Civil Liberties
- Ms Hanna Ryan, Member, NSW Council for Civil Liberties Executive.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

5.6 Deliberative meeting

Resolved, on the motion of Mr Shoebridge: That the committee invite the author of submission 18 to appear in camera today at 1.50 pm.

5.7 Public hearing

Witnesses, the public and the media were re-admitted.

The following witnesses were sworn and examined:

- Professor Rosalind Croucher AM, President, Australian Law Reform Commission
- Mr Jared Boorer, Principal Legal Officer, Australian Law Reform Commission
- Professor Barbara McDonald, Professor, Faculty of Law, University of Sydney (former Commissioner of the Australian Law Reform Commission).

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

5.8 In camera hearing

The following witness was sworn and examined: Witness A.

Persons present other than the committee:

- Ms Teresa McMichael, Clerk to the committee
- Ms Vanessa Viaggio, committee secretariat
- Ms Sarah Henderson, committee secretariat
- Hansard reporters.

The evidence concluded and the witness withdrew.

5.9 Public hearing

Witnesses, the public and media were re-admitted.

The following witnesses were sworn and examined:

- Dr Nicola Henry, Senior Lecturer, Legal Studies, La Trobe University
- Dr Anastasia Powell, Senior Lecturer, Justice and Legal Studies, RMIT University.

Ms Powell tendered the following document: 'Digital Harassment and Abuse of Adult Australians: A Summary Report', by Dr Anastasia Powell and Dr Nicola Henry.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW
- Mr Chris Chow, Chair, Communication, Entertainment and Technology Committee, NSW Young Lawyers
- Ms Maeve Curry, Committee Member, Communications, Entertainment and Technology Committee, NSW Young Lawyers.

Mr McKenzie tendered the following document: submission of the Law Council of Australia to Mr Tim Watts MP regarding the Criminal Code Amendment (Private Sexual Material) Bill.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Services
- Ms Alex Davis, Solicitor, Women's Legal Services.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Asst Prof Bruce Baer Arnold, Director, Australian Privacy Foundation
- Mr David Vaile, Vice-Chair, Australian Privacy Foundation.

The evidence concluded and the witnesses withdrew.

5.10 Tendered documents

Resolved, on the motion of Mr Shoebridge: That the committee accept the following documents tendered during the public hearing:

- 'Digital Harassment and Abuse of Adult Australians: A Summary Report', by Dr Anastasia Powell and Dr Nicola Henry.
- submission of the Law Council of Australia to Mr Tim Watts MP regarding the Criminal Code Amendment (Private Sexual Material) Bill.

6. Other business

In camera witness

Resolved, on the motion of Mr Shoebridge:

- that the committee refer Witness A's evidence to the NSW Privacy Commissioner for comment
- that the secretariat liaise with Witness A in regards to the publication of the witness' submission and *in camera* transcript
- that the secretariat liaise with Witness A as to whether the witness wishes to appear again before the committee.

Witnesses for second public hearing on 16 November 2015
Resolved, on the motion of Mr Shoebridge: That the NSW Police Force be invited to appear as a witness on 16 November 2015.

Resolved, on the motion of Mrs Taylor: That the secretariat liaise with the Parliamentary Education Office to explore the possibility of securing some student leaders to appear at a roundtable before the committee; and that, in the event PEO cannot assist, the secretariat liaise with first year communications students at the University of Technology Sydney, and the University of Western Sydney / King & Wood Mallesons partnership in respect of same.

7. Adjournment
The committee adjourned at 5.13 pm until Monday 16 November 2015 (privacy hearing).

Vanessa Viaggio
Clerk to the Committee

Minutes no. 5
Monday 16 October 2015
Standing Committee on Law and Justice
Macquarie Room, Parliament House, Sydney, 9.15 am

1. Members present
Mrs Maclaren-Jones, *Chair*
Ms Voltz, *Deputy Chair*
Mr Clarke (from 9.18am)
Mr Mookhey (from 9.18am)
Mr Shoebridge (from 9.19am)
Mrs Taylor

2. Previous minutes
Resolved, on the motion of Ms Voltz: That draft minutes no. 4 be confirmed.

3. Correspondence
The committee noted the following items of correspondence:

Received

- ***
- ***
- 10 November 2015 – Ms Jody Doualetas, A/Executive Officer, Office of the Commissioner, NSW Police Force to secretariat, declining the committee's invitation that a representative of the NSW Police Force appear as a witness at the hearing.

Sent

- 4 November 2015 – Chair to Police Commissioner Scipione, requesting he appear as a witness
- 4 November 2015 – secretariat to Dr Elizabeth Coombs, NSW Privacy Commissioner, seeking comment on certain evidence received by the committee at the 30 October 2015 hearing.

****

4. *

5. Inquiry into remedies for the serious invasion of privacy in New South Wales

5.1 Confidential submission

Resolved, on the motion of Mrs Taylor: That the committee keep supplementary submission no. 14a and its attachments confidential, as per the recommendation of the secretariat as they contain sensitive information.

Mr Clarke, Mr Mookhey and Mr Shoebridge arrived.

5.2 In camera witness

Resolved, on the motion of Ms Voltz: That the evidence of Witness A on 16 November 2015 be heard *in camera.*

5.3 Publication of in camera evidence from 30 October 2015

Resolved, on the motion of Ms Voltz: That the committee authorise the publication of the *in camera* evidence of Witness A from 30 October 2015, with the exception of identifying and/or sensitive information which is to remain confidential, as per the request of the witness.

5.4 Reporting date

Resolved, on the motion of Ms Voltz: That the committee hold the privacy report deliberative on Friday 26 February 2016, and table the report on Thursday 3 March 2016.

5.5 Partially confidential submission

The committee noted receipt of submission no. 33, which was received after the submission closing date. The committee deferred consideration of its publication until the next meeting.

5.6 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Robyn Ayres, Executive Director, Arts Law Centre of Australia
- Ms Jennifer Arnup, Lawyer, Arts Law Centre of Australia
- Mr Chris Shain, Photographer.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Sarah Waladan, Manager, Media, Policy and Regulatory Affairs, Free TV Australia; and member of Joint Media Organisations group
- Ms Sarah Kruger, Head of Legal and Regulatory Affairs, Commercial Radio Australia Limited; and member of Joint Media Organisations group.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Dr Normann Witzleb, Associate Professor, Faculty of Law, Monash University.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Anna Johnston, Director, Salinger Privacy.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Ed Santow, Chief Executive Officer, Public Interest Advocacy Centre
- Ms Sophie Farthing, Senior Policy Officer, Public Interest Advocacy Centre.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

5.7 In camera hearing

Resolved, on the motion of Mr Shoebridge: That Dr Elizabeth Coombs, NSW Privacy Commissioner, be authorised to attend the in camera hearing of Witness A.

The following witness was sworn and examined: Witness A.

Persons present other than the committee:

- Ms Teresa McMichael, Clerk to the committee
- Ms Vanessa Viaggio, committee secretariat
- Ms Sarah Henderson, committee secretariat
- Hansard reporters.

The evidence concluded and the witness withdrew.

6. ****

7. ****

8. Adjournment

The committee adjourned at 3.11 pm until Monday 23 November 2015 (inmates hearing).

Vanessa Viaggio
Clerk to the Committee

Draft minutes no. 9
Friday 26 February 2016
Standing Committee on Law and Justice
Room 1136, Parliament House, 9:07 am

1. Members present
Mrs Maclaren-Jones, *Chair*
Ms Voltz, *Deputy Chair*
Mr Clarke
Mr Mookhey
Mr Shoebridge
Mrs Taylor

2. Draft minutes
Resolved, on the motion of Mrs Taylor: That draft minutes nos. 6 and 7 be confirmed.

3. Correspondence
The committee noted the following items of correspondence:

Received

- ****
- 1 December 2015 - Dr Wendy Heywood, Research Officer, Australian Research Centre in Sex, Health and Society, La Trobe University, to committee attaching copy of research report entitled 'Demographic and behavioural correlates of six sexting behaviours among Australian secondary school students'
- ****
- ****
- ****
- ****
- ****
- 12 February 2016 – Dr Elizabeth Coombs, NSW Privacy Commissioner, to committee, drawing the committee's attention to a recent Canadian civil case where the court awarded maximum damages to a plaintiff who suffered a serious invasion of privacy in a 'revenge pornography' type scenario
- ****
- ****

Sent:

- ****
- 30 November 2015 - Chair to Dr Wendy Heywood, La Trobe University, requesting a copy of her recently published study on sexting for the privacy inquiry
- ****
- ****

4. **

4.2 **

4.3 **

5. Remedies for the serious invasion of privacy in New South Wales

5.1 Answers to questions on notice and supplementary questions

The committee noted that answers to questions on notice and supplementary questions from the following inquiry participants were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Ms Vicky Kuek, Principal Policy Lawyer, The Law Society of New South Wales, received 19 November 2015
- Ms Anna Johnston, Director, Salinger Privacy, received 21 November 2015
- Dr Henry and Dr Powell, Senior Lecturers, RMIT University & La Trobe University, received 24 November 2015
- Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW, received 25 November 2015
- Ms Elizabeth Tydd, Chief Executive Officer, Information and Privacy Commission NSW, received 25 November 2015
- Dr Elizabeth Coombs, NSW Privacy Commissioner, Office of the Privacy Commissioner, received 25 November 2015
- Mr Stephen Blanks, President, NSW Council for Civil Liberties, received 26 November 2015
- Mr Ed Santow, Chief Executive Officer, Public Interest Advocacy Centre, received 1 December 2015
- Ms Robyn Ayres, Executive Director, Arts Law Centre of Australia, received 4 December 2015
- Professor Barbara McDonald, Professor, Faculty of Law, University of Sydney, Former Commissioner of the Australian Law Reform Commission, received 8 December 2015
- Mr Bruce Baer Arnold, Director, Australian Privacy Foundation, received 15 December 2015
- Ms Sarah Waladan, Manager, Media Policy and Regulatory Affairs, Free TV Australia, received 18 December 2015
- Mr Chris Chow, Chair of the Communications, Entertainment and Technology, Law Committee of NSW Young Lawyers, received 18 December 2015
- Dr Normann Witzleb, Monash University, received 11 January 2016.

5.2 Transcript clarification

Resolved, on the motion of Mrs Taylor: That a footnote be inserted after the words "criminal record" on page 42 of the transcript of 16 November 2015, with the following words:

> Clarification: Ms Johnston has advised that this example was given in error. She has subsequently referred to a study by a Harvard academic into discriminatory racial profiling affecting Google ad results. Refer to correspondence dated 20 November 2015 from Ms Johnston to the Chair.

5.3 Consideration of Chair's draft report

The Chair submitted her draft report entitled *Remedies for the serious invasion of privacy in New South Wales* which, having been previously circulated, was taken as being read.

Chapter 1

Resolved, on the motion of Mr Clarke: That paragraph 1.7 be omitted: 'It is also worth noting that the Australian Senate is currently undertaking an inquiry into the issue of revenge

pornography. The Senate committee, which is looking at many of the same issues examined in this inquiry, is due to report on 25 February 2016', and the following new paragraph be inserted instead:

'The Senate Legal and Constitutional Affairs References Committee has recently completed an inquiry specifically examining the issue of revenge pornography. The Senate committee recommended that the Commonwealth along with the states and territories enact criminal offences for the recording, sharing of intimate images without consent, and for threatening to do so. It also recommended that the Commonwealth government give further consideration to the Australian Law Reform Commission's recommendations regarding a statutory cause of action.' [FOOTNOTE: Recommendations 2, 3 and 6, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.]

Chapter 2

Resolved, on the motion of Ms Voltz: That paragraph 2.14 be amended by omitting 'however there was no suggestion that it was done with retaliation or revenge in mind as the two were romantically involved at the time' after 'Ms Bingle's consent or knowledge'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.44:

'The committee accepts that the ALRC's nine guiding principles to shape the process of privacy law reform are balanced, clear and provide a basis on which governments should proceed to reform the law in this area.'

Resolved, on the motion of Mr Shoebridge: That paragraph 2.46 be amended by inserting at the end: 'We would be ignoring the reality of the matter if we did not accept the view that this is an area of intrusion into privacy that is likely to become more topical and widespread in coming years. This adds weight to the case for adopting a more comprehensive and well-founded remedy for serious breaches of privacy to allow for any such disputes to be resolved in a timely, cost-effective and constructive manner.'

Chapter 3

Mr Shoebridge moved: That the following committee comment and recommendation be inserted at the end of paragraph 3.24:

'**Committee comment**

Given the very real concerns the committee believes that there is a good case for a prompt statutory review of the scope of the exemption in s 27 of the Act to determine if it achieves the appropriate balance between ensuring police can effectively undertake their duties of law enforcement and crime prevention, while ensuring that there are measures in place to properly and adequately protect the privacy of NSW residents.

Recommendation

That the NSW Government undertake a review of the scope of the exemption in s 27 of the PPIP Act to determine if it achieves the appropriate balance between ensuring police can effectively undertake their duties of law enforcement and crime prevention, while ensuring that there are measures in place to properly and adequately protect the privacy of NSW residents.'

Question put and negatived.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.43:

'Women's Legal Services made a number of recommendations regarding a statutory review of the Crimes (Domestic and Personal Violence) Act 2007 and apprehended violence orders. The organisation suggested:

8.4 Updated consultation on the statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), including an exposure draft bill that contemplates the realities of technology-facilitated stalking and abuse.

8.5 Including an apprehended violence order (AVO) prohibiting the defendant from attempting to locate, asking someone else to locate, follow or keep the protected person under surveillance.

8.6 Including an AVO prohibiting the actual or threatened publishing or sharing of images or videos of the protected person of an intimate nature.

8.7 Including a provision allowing AVOs to be used for an injunctive order such as a take down order or deliver up order.'

Resolved, on the motion of Mr Shoebridge: That the following committee comment and recommendation be inserted after Recommendation 1:

'**Committee comment**
The committee believes there is merit in the Women's' Legal Services NSW submission that the Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*. This review should consider the benefits of including in the potential orders available to a local court in proceedings under the Act including take down orders and prohibitions on threatening or publishing or sharing of images or videos of an intimate nature.

Recommendation
That the NSW Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* to consider additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by apprehended domestic violence orders.'

Resolved, on the motion of Mr Clarke: That the following new paragraph be inserted after paragraph 3.53:

'The committee notes that the Senate Legal and Constitutional Affairs Reference Committee recently made recommendations for the introduction of criminal offences at a federal level as well as in the states and territories, specifically to address non-consensual sharing of intimate images.'

Resolved, on the motion of Ms Voltz: That the following new paragraphs be inserted at the end of the above new paragraph:

'Recommendations 2 and 3 of the Senate committee's report state:

Recommendation 2

5.18 Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state and territory legislation, offences for:

- knowingly or recklessly recording an intimate image without consent;
- knowingly or recklessly sharing intimate images without consent; and
- threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.

Recommendation 3

The committee recommends that the states and territories enact legislation with offences the same or substantially similar to those outlined in Recommendation 2, taking into account relevant offences enacted by the Commonwealth government.

We note the above report. It would be appropriate for the NSW Government to consider the Senate Committee's recommendations.' [FOOTNOTE: Recommendations 2 and 3, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.]

Chapter 4
Resolved, on the motion of Ms Voltz: That recommendation 5 be amended by inserting the following new paragraph after paragraph b):

'c) ensure that the NSW Privacy Commissioner is empowered to refer a complaint on behalf of a complainant to the NSW Civil and Administrative Tribunal for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take down orders and cease and desist orders, and'

Resolved, on the motion of Mr Mookhey: That recommendation 6 be amended by omitting 'to enable it to hear claims arising out of the statutory cause of action' and inserting instead 'to enable it to hear claims (in addition to ordinary civil courts) arising out of the statutory cause of action'.

Resolved, on the motion of Ms Voltz:

The draft report, as amended, be the report of the committee and that the committee present the report to the House;

The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;

Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;

Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;

Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;

That the report be tabled on Thursday 3 March 2016.

6. ****

7. Adjournment

The committee adjourned at 9:50 am *sine die*.

Vanessa Viaggio
Committee Clerk